No. 75- 355

IN THE

Supreme Court of the United States

October Term, 1975

BANGOR PUNTA CORPORATION, NICOLAS M. SALGO AND DAVID W. WALLACE,
Petitioners,

v.

CHRIS-CRAFT INDUSTRIES, INC., *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JAMES V. RYAN
ROGER L. WALDMAN
One Rockefeller Plaza
New York, New York 10020

LLOYD N. CUTLER
MANUEL F. COHEN
LOUIS R. COHEN
1666 K Street, N.W.
Washington, D. C. 20006

CHARLES ALAN WRIGHT
2500 Red River Street
Austin, Texas 78705

Counsel for Petitioners

C. KENNETH SHANK, JR.
ALLAN J. GRAF
Webster Sheffield Fleischmann Hitchcock & Brookfield

ARTHUR F. MATHEWS
MICHAEL S. HELFER
Wilmer, Cutler & Pickering

Of Counsel

INDEX

TABLE OF AUTHORITIES

IN THE

Supreme Court of the United States

October Term, 1975

No. 75-

BANGOR PUNTA CORPORATION, NICOLAS M. SALGO AND DAVID W. WALLACE,

Petitioners,

v.

CHRIS-CRAFT INDUSTRIES, INC., *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners, Bangor Punta Corporation, Nicolas M. Salgo and David W. Wallace, Defendants-Appellees below, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on April 11, 1975.

Opinions Below

The opinion of the District Court for the Southern District of New York on the issue of liability is reported at 337 F.Supp. 1128 and is reproduced at pp. A-125-162 of the Joint Appendices.* The opinion of the Court of Appeals on

* The opinions below are reproduced in a separate volume of Joint Appendices A through E submitted with this Petition and the petitions of other defendants, and "A", "B", "C", "D" and "E" page references are to that volume.

the issue of liability (A-1-124) is reported at 480 F.2d 341 (*"Chris-Craft II"*). The opinion of the District Court on relief (B-43-80) is reported at 384 F.Supp. 507. The opinion of the Court of Appeals on relief (B-1-42) is reported at 516 F.2d 172 (*"Chris-Craft III"*).

Prior opinions of the District Court (C-32-48) and the Court of Appeals (C-1-31) relating to an application for a preliminary injunction are reported at 303 F.Supp. 191 and 426 F.2d 569 (*"Chris-Craft I"*), respectively. The opinions of the District Court in the connected cases of *SEC* v. *Bangor Punta Corporation* (D-1-21) and *Bangor Punta Corporation* v. *Chris-Craft Industries, Inc.* (D-22-34) are reported at 331 F.Supp. 1154 and 337 F.Supp. 1147, respectively.

Jurisdiction

The judgment of the Court of Appeals was entered on April 11, 1975 (E-1-2), and a timely petition for rehearing was denied on June 9, 1975 (E-3, E-6). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

Questions Presented

This case presents the following important questions concerning the existence and nature of an implied cause of action for damages, in favor of one aspirant in a corporate takeover contest against another, under Sections 10(b) and 14(e) of the Securities Exchange Act of 1934 ("1934 Act"):

1. Is there an implied private cause of action for damages—

(a) under Section 10(b) of the 1934 Act and Rule 10b-6 thereunder, where plaintiff neither bought nor sold the securities involved in the alleged violation, **or**

(b) under Section 14(e) of the 1934 Act, on account of an omission from a prospectus for an exchange offer neither directed to plaintiff nor accepted by it?

2. If there are such implied causes of action, may a plaintiff recover damages from defendants who acted in good faith and in reasonable reliance upon expert advisers, without intent to mislead or other form of scienter?

3. If there are such implied causes of action, may a Court of Appeals impose damages by establishing presumptions of reliance and of injury despite findings by the District Court, left undisturbed on appeal, that there was no evidence of reliance and that plaintiff was not injured in fact?

4. If there are such implied causes of action, what is the proper measure of damages in favor of a losing aspirant in a corporate takeover contest?

5. May a Court of Appeals, instead of remanding for a further hearing, use excerpts from a record created for the purpose of determining damages under one measure of recovery to determine damages under a different measure of recovery, thereby increasing damages from $1.7 million to $25.8 million, and increasing prejudgment interest from $600,000 to nearly $10 million?

Statutes and Regulations Involved

Section 10(b) of the 1934 Act, 15 U.S.C. § 78j(b), Section 14(e) of the 1934 Act, 15 U.S.C. § 78n(e), Section 28(a) of the 1934 Act, 15 U.S.C. § 78bb(a), Section 11 of the Securities Act of 1933 ("1933 Act"), 15 U.S.C. § 77k, and Rule 10b-6 under the 1934 Act, 17 C.F.R. § 240.10b-6, are set forth in an Appendix to this Petition.

Statement of the Case

A. Preliminary Statement

This case arises out of a contest for control of Piper Aircraft Corporation ("Piper"). The "winner," Bangor Punta Corporation ("BPC"), a publicly held company, has been held liable—jointly and severally with two of its directors, three members of the Piper family and Piper's financial adviser—to pay the "loser," Chris-Craft Industries, Inc. ("CCI"), which still owns 43% of Piper, nearly $36 million (including prejudgment interest). The judgment is the largest amount ever awarded in a case arising under the federal securities laws. It is substantially more than the current market value of BPC's common stock or CCI's common stock and is approximately equal to the entire shareholders' equity in Piper.

This massive judgment brings into sharp focus issues related to those this Court considered only last Term in *Blue Chip Stamps* v. *Manor Drug Stores,* 95 S.Ct. 1917 (1975), *Cort* v. *Ash,* 95 S.Ct. 2080 (1975), and *Rondeau* v. *Mosinee Paper Corp.,* 95 S.Ct. 2069 (1975), concerning the scope of implied rights of action for money damages under federal statutes such as the anti-fraud provisions of the 1934 Act. The Court of Appeals here, in its zeal to be certain that BPC's two technical violations of the federal securities laws would be severely punished, eliminated every traditional legal requirement that stood in its path:

> *First,* it implied a private right of action for damages under Section 10(b) and Rule 10b-6 in favor of a plaintiff who neither purchased nor sold the security involved, contravening the doctrine this Court later upheld in *Blue Chip Stamps.*
>
> *Second,* it implied a private right of action for damages under Section 14(e) on account of an omission in a prospectus, in favor of a plaintiff who did not

acquire the securities covered by the prospectus and was not a member of the class intended to be protected by Section 14(e), contravening well-established principles reaffirmed only last Term in *Cort*.

Third, it nullified the trial court's finding that BPC and its directors acted in good faith by effectively abolishing any requirement of scienter in private damage actions. Compare *Ernst & Ernst* v. *Hochfelder,* 503 F.2d 1100 (7th Cir. 1974), *cert. granted,* 95 S.Ct. 1557 (1975).

Fourth, it held that any violation of the securities laws is to be presumed to have caused an actual injury, and on this basis disregarded the trial court's finding that there was no such causal nexus. Compare *Mills* v. *Electric Auto-Lite Co.,* 396 U.S. 375 (1970), with *Rondeau.*

Fifth, disregarding express statutory limitations on damages and its own previous definition of the injury the plaintiff suffered, it awarded massive damages wholly unrelated to any injury BPC or its directors could have caused. See Section 28(a) of the 1934 Act.

Finally, it calculated such damages itself, without remand, by selecting isolated testimony not credited by the trial court. It then "affirmed" the District Court's grant of prejudgment interest, though the amount of damages and thus interest had been increased fifteen-fold.

One result of these rulings is to impose a crushing penalty on the former shareholders of the target corporation who accepted BPC's exchange offer and now hold BPC shares—the very class that the statutes involved were explicitly designed to protect. Another result is to give CCI—the loser in a vigorous battle for control in which, as all courts have agreed, BPC and its directors acted in good

faith—vastly more than CCI would now have if it had won instead of lost the contest. An award of this sort will inevitably discourage competitive tender offers, a result Congress plainly did not intend.

B. Facts

CCI began purchasing Piper stock in December 1968 and made a cash tender offer for 300,000 Piper shares in January 1969. Piper's management opposed CCI's tender offer, but CCI achieved its goal. By the end of April, having made additional cash purchases, CCI owned 34% of Piper's outstanding shares. See Table on p. 8, Items 1-3.*

BPC did not purchase any Piper shares until May 1969. Piper's investment adviser, The First Boston Corporation ("First Boston"), had invited BPC to seek control of Piper, and, on May 8, BPC purchased the shares held by individual members of the Piper family (about 31% of all the Piper shares). A few days later BPC bought an additional 7% of the Piper shares for cash in private, off-exchange transactions from three large investors. After the purchase of this 7%, which the Court of Appeals later held violated Rule 10b-6, BPC had a slim 4% lead over CCI with almost 30% of the Piper shares still in public hands. Table, Items 4 and 5.

Two months later, in July, BPC offered to exchange its securities for the remaining Piper shares, and CCI made a competing exchange offer. As a result of these offers, BPC and CCI each acquired an additional 7% of Piper, and BPC held a narrow 4% lead, with 15% of the stock still in the hands of public shareholders. Table, Items 6-8. BPC was later held to have violated Section 14(e) during its exchange offer; this is the second of the two violations on which the Court of Appeals based its massive judgment.

---

* The contest for control of Piper is summarized in the Table on page 8.

At the conclusion of the competing exchange offers, neither aspirant had control of Piper. The District Court specifically found that, as late as August 19, 1969, control was available to either BPC or CCI, and accordingly denied CCI's request for preliminary injunctive relief against future purchases by BPC, saying:

> "Neither party has gained control of Piper, and both are still in a position to do so." (C-47)

The Court of Appeals *en banc* affirmed this conclusion in *Chris-Craft I* and went on to say that in mid-August 1969 CCI was not at any real disadvantage in the contest:

> ". . . we conclude that the district court did not err in refusing to enjoin the continued solicitation of stock by Bangor Punta. At that time Chris-Craft was free to compete equally with Bangor Punta for the remaining Piper shares, and it did so. We do not understand Chris-Craft to allege that prior misdeeds of Bangor Punta so determined the course of the competition for shares after the date of the decision below that Chris-Craft was placed at any real disadvantage." (C-9)

Although control was still available to either side after the competing exchange offers ended—approximately 243,000 Piper shares were in the hands of the public—CCI purchased only 29,200 more shares and then stopped making purchases and voluntarily "withdrew from the battle" owning 42% of Piper's stock. (B-7) BPC purchased over 100,000 additional shares, reaching a total of 51% on September 5, 1969. Table, Items 9 and 10. All of these purchases by BPC were made at a time when control was still available to both aspirants, and all were wholly lawful. These lawful purchases gave BPC a majority interest, an event subsequently held to have done a $36 million injury to CCI.

SUMMARY OF THE CONTEST FOR CONTROL

Total Piper Shares Outstanding ------------------------ 1,644,790

	Acquisition of Piper Shares				Cumulative Percentage of Piper Shares Owned		
Buyer	Type of Acquisition	Dates	No. of Shares	% of Total	CCI	BPC	Public
1. CCI	cash purchases	12/30/68-1/22/69	203,700	12.4%	12.4%	0%	87.6%
2. CCI	cash tender offer	1/23/69-2/ 3/69	304,606	18.5%	30.9%	0%	69.1%
3. CCI	cash purchases	1/23/69-4/ 7/69	47,900	2.9%	33.8%	0%	66.2%
		[MAY 8: BPC ENTERED CONTEST]					
4. BPC	sale by Piper family	5/ 8/69	501,090	30.5%	33.8%	30.5%	35.7%
5. BPC	cash purchases	5/14/69-5/23/69	120,200	7.3%	33.8%	37.8%	28.4%
		[MAY 22: THIS LITIGATION BEGAN]					
6. CCI	exchange offer	5/15/69-7/24/69			WITHDRAWN		
7. BPC	exchange offer	7/18/69-7/29/69	110,802	6.7%	33.8%	44.5%	21.7%
8. CCI	exchange offer	7/24/69-8/ 4/69	112,089	6.8%	40.6%	44.5%	14.9%
9. CCI	cash purchases	8/12/69-8/18/69	29,200	1.8%	42.4%	44.5%	13.1%
		[AUGUST 19: PRELIMINARY INJUNCTION DENIED; CCI "WITHDREW FROM THE BATTLE"]					
10. BPC	cash purchases	8/ 8/69-9/ 5/69	100,614	6.1%	42.4%	50.6%	7.0%

C. Litigation

This action was commenced on May 22, 1969.* In its first amended complaint, CCI alleged principally that BPC's private purchases of 120,200 Piper shares in May 1969 violated Rule 10b-6, which prohibits a person participating in the distribution of a security from acquiring that security or any right to acquire that security. The District Court held that Rule 10b-6 did not apply to those transactions.**

In *Chris-Craft I,* the majority of the Court of Appeals, over the strong dissent of Chief Judge Lumbard, disagreed. It held that purchases of a target company's stock by the maker of an exchange offer for that stock constituted purchases of rights to acquire the maker's own stock, in violation of Rule 10b-6. The case was remanded to the District Court.***

---

* Jurisdiction of the District Court was invoked under 28 U.S.C. § 1331(a), Section 27 of the 1934 Act, 15 U.S.C. § 78aa, and Section 22 of the 1933 Act, 15 U.S.C. § 77v.

** CCI's theory was that BPC, having announced its intention to offer BPC securities in exchange for Piper shares, was engaged in the distribution of BPC securities; that Piper stock represented a right to acquire BPC securities in the exchange offer itself; and that BPC was therefore prohibited by Rule 10b-6 from purchasing Piper stock. District Judge Tenney ruled that the purpose behind Rule 10b-6—preventing the artificial stimulation of the market in the shares being distributed—would not be served by applying the Rule in this situation. (C-45) Here, purchases of Piper shares by BPC could have the effect, if any, only of making BPC's exchange offer less attractive by increasing the price of Piper stock—obviously not what BPC wanted to do. Chief Judge Lumbard subsequently pointed out that BPC "did not then know of any rule or interpretation precluding the transactions." (C-22)

*** CCI also alleged in its first amended complaint that the press release issued by Piper and BPC on May 8, 1969, which included the statement that BPC intended to offer "Bangor Punta securities to be valued in the judgment of The First Boston Corporation at not less than $80 per Piper share," violated Section 5(c) of the 1933 Act, 15 U.S.C. § 77e(c), by going beyond Rule 135, 17 C.F.R. § 230.135, which specifies the information that may be published before the filing of a registration statement. Since the statement was entirely accurate, the Court of Appeals, like the District Court, found that CCI had not been damaged by the release. (A-42-43) This issue is no longer involved in this case.

CCI then filed a second amended complaint, adding the charge that the prospectus for BPC's July 1969 exchange offer had failed to disclose an alleged agreement to sell BPC's investment in the Bangor and Aroostook Railroad ("BAR"). CCI claimed that because of this alleged omission, the prospectus violated Section 14(e) of the 1934 Act. Shortly thereafter, the Securities and Exchange Commission ("SEC") brought an action against BPC making the same allegation and seeking an injunction requiring BPC to offer rescission to the former Piper shareholders who had exchanged their shares, plus a general injunction against future securities law violations.

The CCI and SEC actions were tried together. The evidence established that, while BPC had by July received a proposal to dispose of its investment in the BAR, there was no agreement to sell. (D-11-12) The evidence further established that counsel for BPC and First Boston, together with BPC's independent accountants, had reviewed the status of the BAR with BPC and First Boston executives. These experts had unanimously advised BPC that because the discussions of a possible sale or other dispositions of the BAR were in a preliminary stage and the legal, accounting and tax implications had not been explored or considered by the BPC Board of Directors, disclosure of possible dispositions and the implications of each was not required and could prove misleading.* (D-6-12)

In the SEC case, the District Court ruled that there was no concealed agreement to sell the BAR. However, the Court held as well that, although BPC "did not intentionally or purposefully mislead" the recipients of the prospectus, the offer of $5 million for BPC's interest in the BAR made the carrying value of $18.4 million on BPC's balance sheet "obsolete." (D-14) It therefore ordered BPC to offer to rescind all of its acquisitions of Piper stock pur-

* BPC's interest in the BAR was later sold to Amoskeag Corp. on October 2, 1969 for $5 million. (D-3)

suant to the exchange offer. However, the Court denied the requested injunction against future violations because it found *no* "bad faith" or propensity to violate the securities laws on the part of BPC. (D-14, 17)

In CCI's case, the District Court, after trial, dismissed the complaint. It held that the Rule 10b-6 violation was a technical one, which had not misled anyone and had not injured CCI. (A-149, 151) With respect to the Section 14(e) claim, the District Court repeated the conclusion it had reached in the SEC case: the prospectus was "unintentionally in error." (A-143) The District Court also held that the offer of rescission required in the SEC case was the only appropriate remedy for this unintentional error, since CCI was unable to show any causal nexus between the alleged violations and its claimed injury. (A-144-146)

On appeal (*Chris-Craft II*), the Court of Appeals reversed and remanded, holding that CCI had standing to sue for damages under Rule 10b-6 and Section 14(e). The Court of Appeals acknowledged that the defendants' violations were technical and not made in bad faith. (A-37, 47, 97-100, 117-123) It also acknowledged that there was no evidence that CCI could ever have gained control of Piper, even if the defendants had not violated the law. (A-56, 66) Nevertheless, the Court of Appeals held that the violations would be presumed to have injured CCI by denying it a fair opportunity to compete for control. (A-60)

The Court of Appeals then directed the District Court to issue an injunction barring BPC from voting either bloc of Piper shares for five years so that BPC would (as it does today) have the power to vote only 37% of the shares against CCI's 42%. In addition to this injunction and the rescission offer that had already been ordered in the SEC case, the Court of Appeals directed that damages be awarded to CCI, measured by

> "the reduction in the appraisal value of CCI's Piper holdings attributable to BPC's taking a majority posi-

tion and reducing CCI to a minority position, and thus being able to compel a merger at any time." (A-69)

On remand,* the District Court heard testimony and received evidence on the "reduction in the appraisal value" of CCI's Piper shares attributable to BPC's acquiring control. It held that CCI was to be compensated for the loss of its opportunity to compete for control of Piper as of September 5, 1969 when, if the shares BPC acquired in the challenged transactions are ignored, CCI would have had a hypothetical 42% to 37% lead. After analyzing the factors that give value to control in this situation, the District Court "generously valued" this opportunity premium at five percent of the intrinsic value of the Piper stock, or $2.40 per share. This calculation produced a damage award of $1,673,988. (B-70) In addition, the District Court awarded prejudgment interest, which totaled $599,011. (B-79)

On appeal (*Chris-Craft III*), the Court of Appeals deemed this judgment for more than $2 million "quite insubstantial," and took the following steps to enlarge it:

1. Discarding the damage formula it had enunciated in *Chris-Craft II*, the Court of Appeals held that the measure of damages was the difference between the historical cost to CCI of all its Piper shares and the price at which CCI could theoretically have sold the stock after BPC acquired control. It did so despite the facts that (a) CCI had acquired almost 80% of its holdings before BPC entered the contest; (b) neither BPC nor its directors had

* On July 20, 1973, petitioners BPC, Salgo and Wallace petitioned this Court for a writ of certiorari to review the decision of the Court of Appeals in *Chris-Craft II*. Certiorari was denied, 414 U.S. 910 (1973). That denial, of course, does not prevent this Court from reaching the issues raised in this petition. *See, e.g., Mercer* v. *Theriot,* 377 U.S. 152, 153 (1964); Stern & Gressman, *Supreme Court Practice* § 2.2 at 27 (4th ed. 1969). Petitioners have preserved these issues throughout the course of the litigation. *See, e.g., Chris-Craft III* at B-40, n. 30.

misled CCI or encouraged it in any way to purchase any shares; and (c) CCI would have suffered precisely the same decline in the market value of its Piper shares had it obtained the control it allegedly was unfairly denied.

2. The Court of Appeals then decided that it would itself determine damages without a remand, and did so on the basis of selected portions of the testimony and report of one CCI expert witness—a witness whose testimony and report were discredited by the trial judge and whose opinion, like that of the other experts, was premised on the formula enunciated in *Chris-Craft II.* On the basis of those excerpts, the Court of Appeals then directed that judgment be entered against all defendants, jointly and severally, for $25,793,365. (B-21-32)

3. The Court of Appeals also "affirmed" the District Court's decision to award prejudgment interest on the ground that this was a matter "within the equitable discretion of the district court to be exercised according to considerations of fairness." (B-32-33) Because of the redetermination of damages, however, this "affirmance" increased the actual interest award from $599,011 to approximately $10,000,000.

Reasons for Granting the Writ

This already well known case involves a series of rulings that will greatly broaden the scope and consequences of implied private damage actions under the 1934 Act, and thus increase the burdens on the federal judiciary. These rulings will also effectively discourage future corporate takeover contests, a result contrary to the express intent of Congress.

Petitioners do not ask this Court to review the decision that it unintentionally committed two technical

securities law violations in the midst of a hard-fought contest for corporate control. Petitioners believe that the decisions below on these points are wrong and that their actions, all of which were taken after careful consultation with counsel, were lawful. Petitioners recognize, however, that this aspect of the case is not of sufficient general importance to warrant review.

Instead, Petitioners bring to this Court important and recurring issues of wide application involving the creation of implied private rights of action for damages, scienter, causation, measure of damages and due process of law. Each of these issues is important to the lower federal courts, the business community and the investing public.

Taken together, the erroneous rulings below eliminate every traditional element of an implied cause of action for damages under the anti-fraud provisions of the 1934 Act, except proof of the violation itself. One inevitable result will be to discourage tender offers and takeover contests, which frequently create substantial benefits for the target company's shareholders. This will in turn defeat an objective recognized by Congress in adopting the Williams Act, which added Section 14(e) to the 1934 Act, that takeover bids "should not be discouraged." S. Rep. No. 550, 90th Cong., 1st Sess. at 3 (1967); H.R. Rep. No. 1711, 90th Cong., 2nd Sess. at 4 (1968). This congressional intention was expressly noted by this Court only last Term in *Rondeau,* 95 S.Ct. at 2076.

In *Electronic Specialty Co.* v. *International Controls Corp.,* 409 F.2d 937, 948 (2d Cir. 1969), Judge Friendly observed:

> "Probably there will no more be a perfect tender offer than a perfect trial. Congress intended to assure basic honesty and fair dealing, not to impose an unrealistic requirement of laboratory conditions that might make the new statute a potent tool for incumbent manage-

ment to protect its own interests against the desires and welfare of the stockholders."

If there can be no "perfect tender offer," then even the most prudent offeror risks making technical and good faith violations of the sort found below. Yet under the Court of Appeals' decision, such an offeror must insure his opponent against all losses, even if unrelated to the offeror's actions. If such a result is to be the consequence of good faith mistakes inevitable in a takeover contest, then tender offers and takeover contests will be seriously discouraged. Surely this Court will wish to decide whether this result, which "Congress expressly disclaimed," *Rondeau,* 95 S.Ct. at 2076, is to be judicially proclaimed.

A. The Decision That One Aspirant in a Corporate Takeover Contest Has Implied Causes of Action for Damages Against Another Aspirant Under Section 10(b) and Section 14(e) Conflicts with the Principles Underlying *Blue Chip Stamps* and *Cort* and This Court's Earlier Decision in *Texas & Pacific Ry.* v. *Rigsby.*

The Court of Appeals created two new *implied* rights of action for money damages under the federal securities laws. First, in contravention of the principles underlying this Court's later decision in *Blue Chip Stamps,* the Court of Appeals held that a non-purchaser of securities has a private right of action for damages under Section 10(b) of the 1934 Act and Rule 10b-6 thereunder. Second, disregarding the principles set forth in *Texas & Pacific Ry.* v. *Rigsby,* 241 U.S. 33 (1916), and reaffirmed only last Term in *Cort,* the Court of Appeals held that one tender offeror has a private right of action for damages against another under Section 14(e), even though tender offerors are not within the "especial class" that Section 14(e) was enacted to protect.

Before turning to these points, we note that the SEC has just taken a position before this Court that, if adopted,

would preclude implying private damage remedies in favor of CCI under either Section 10(b) or Section 14(e). In its Brief as Amicus Curiae at 8-9 in *Ernst & Ernst* v. *Hochfelder, cert. granted,* 95 S.Ct. 1557 (1975) (No. 74-1042), the SEC said:

> "... the limitations upon damage liability that Congress imposed in those sections of the federal securities laws that expressly provide for private damage suits for violations of those laws constitute an appropriate guideline for the courts in determining the scope of the implied action under Rule 10b-5.
>
> "These express civil remedies permit a plaintiff to recover for negligent conduct only in circumstances where (i) the defendant knew or could reasonably foresee that the *plaintiff* would rely on his conduct, (ii) the *plaintiff* did in fact so rely, and (iii) the amount of the plaintiff's damages caused by the defendant's conduct was definite and ascertainable. The same limitations should be applied to damage actions under Rule 10b-5 where the defendant's conduct was negligent." (Emphasis added.)

None of these three tests is met here. CCI was not expected to rely, and did not in fact rely, on any conduct of BPC, Salgo or Wallace. Moreover, CCI's damages were, as is more fully described in Point D below, neither "caused by the defendant" nor "definite and ascertainable." While the SEC's brief in *Hochfelder* specifically concerned standing to seek damages for violations of Rule 10b-5, its position is equally applicable to Rule 10b-6, which is based on the same section of the same statute, and to Section 14(e), which embodies the same principles and much of the same language as Rule 10b-5.*

---

* Nor is there any reason why the position the SEC has taken with respect to conduct characterized as "negligent" should not be equally applicable to the conduct of BPC and its directors, which all courts characterized as "in good faith" or "unintentionally in error." (A-37, 47, 97-100, 117-123, 143; D-14)

1. Section 10(b)

Rule 10b-6 applies to every distribution of securities. It prohibits a corporation that is distributing securities from simultaneously purchasing either those securities or rights to buy them. The purpose of the Rule is to prevent price manipulation during the distribution. BPC was engaged in a distribution of BPC securities in exchange for Piper stock in July 1969. Its off-exchange, private purchases of Piper stock from three institutions during the previous May were held to violate Rule 10b-6.

CCI neither purchased nor sold any BPC securities. The Court of Appeals nevertheless held that CCI could bring an implied cause of action for damages against BPC under Section 10(b) of the 1934 Act and Rule 10b-6 thereunder.

This holding contravenes the principle this Court declared in *Blue Chip Stamps,* upholding the doctrine of *Birnbaum* v. *Newport Steel Corp.,* 193 F.2d 461 (2d Cir. 1952), *cert. denied,* 343 U.S. 956 (1952). This Court held in *Blue Chip Stamps* that the phrase "in connection with the purchase or sale of any security" in Section 10(b) limits private causes of action for damages to actual purchasers or sellers of the securities involved.

The Court of Appeals specifically recognized that the phrase "in connection with the purchase or sale of any security" would, if applicable, bar CCI from pursuing its claim. However, it simply ignored the statutory language and held that CCI could bring an implied action under Rule 10b-6 because Rule 10b-6 does not repeat the statutory "in connection with" language, while Rule 10b-5 does. (A-65, n. 29)

The distinction is groundless, because both rules derive their authority from Section 10(b) of the 1934 Act, which does contain the limiting phrase. That Rule 10b-6 does

not repeat the statutory phrase is irrelevant, for the rule cannot enlarge upon the statute. *Miller* v. *United States,* 294 U.S. 435 (1935). Were the law otherwise, as the Court of Appeals here thought, then the SEC could itself reverse *Blue Chip Stamps* by amending Rule 10b-5 to exclude the statutory phrase.

2. Section 14(e)

The Court of Appeals also created a new private cause of action for damages under Section 14(e) of the 1934 Act, which is designed to protect the shareholders of a target corporation by requiring aspirants for control to disclose material information to them. Disregarding the principle that a right of action may be implied from a statute only in favor of the class for whose benefit the legislation was enacted, the Court of Appeals held that Section 14(e) implied a private right of action for damages on behalf of an unsuccessful tender offeror. The result was to convert legislation designed as a shield for target shareholders into a sword that, as here, can result in collecting huge damages at the expense of members of the very class Congress sought to protect.

Section 14(e) was added to the 1934 Act by the Williams Act, the sole purpose of which was to protect shareholders of the target company. S. Rep. No. 550, 90th Cong., 1st Sess. (1967); H.R. Rep. No. 1711, 90th Cong., 2nd Sess. (1968). This Court specifically recognized the congressional intent in *Rondeau,* when it stated, 95 S.Ct. at 2075-76:

> "The purpose of the Williams Act is to insure that public shareholders who are confronted by a cash tender offer for their stock will not be required to respond without adequate information regarding the qualifications and intentions of the offering party."

CCI is not a member of the class Congress intended to protect. The congressional purpose was to protect target

company shareholders confronted with a tender offer who must decide, on the basis of information that the offeror supplies or fails to supply, whether to tender their shares. CCI made no such decision. It did not accept BPC's exchange offer or, as the District Court specifically found (A-143), otherwise rely on BPC's prospectus. Nor does it seek damages on the basis of a failure to accept the BPC offer.

In creating from a statute enacted to protect one class an implied private right of action for a wholly different class, the Court of Appeals disregarded established principles, recently reaffirmed by this Court, that limit the judicial creation of rights of action in the face of congressional silence. In *Rigsby,* this Court held that rights of action could be implied from federal statutes only in favor of "the class for whose especial benefit the statute was enacted," 241 U.S. at 33. And only last Term in *Cort,* this Court listed the first question to be answered in determining whether a private right of action could be implied from a statute as follows, 95 S.Ct. at 2087-88:

> ". . . is the plaintiff 'one of the class for whose *especial* benefit the statute was enacted,' *Texas & Pacific Ry.* v. *Rigsby,* 241 U.S. 33, 39 . . . (1916) (emphasis supplied)—that is, does the statute create a federal right in favor of the plaintiff?"

Each judge on the panel that decided *Chris-Craft II* had a different reason for ignoring these principles. Judge Timbers thought that he should "not infer from the silence of the statute that Congress intended to deny a federal remedy and to extinguish liability which, under established principles of [state] tort law, normally attend the doing of a proscribed act." (A-30) But, of course, the fact that the remedy for the act complained of has traditionally been sought in the state courts based on state law argues against, not for, implying a federal remedy from a federal statute

designed to protect a different class of persons. See *Cort,* 95 S.Ct. at 2088. Judge Mansfield stated that CCI had "standing solely on the ground that vigorous enforcement of the anti-fraud provisions through private litigation . . . calls for . . . implication of a private right of action in favor of a defeated contestant against the successful bidder for control. . . ." (A-102-103) But this rationale as the sole justification for implying a private right of action was rejected in *Blue Chip Stamps,* 95 S.Ct. at 1923, 1931-32. Moreover, the target shareholders, the protected class, are quite capable of bringing class actions to enforce their own rights, and these actions provide a significant supplement to SEC enforcement proceedings. *Cf. Rondeau,* 95 S.Ct. at 2077, n. 10. Finally, Judge Gurfein concurred on the ground that since BPC needed the 7% it acquired in the exchange offer to achieve control, CCI had standing. (A-95) His theory would require a remedy to be implied in favor of any person who could allege injury, however indirect, whether or not the plaintiff was a member of the class to be protected. This rationale too was rejected in *Blue Chip Stamps,* 95 S. Ct. at 1926-27, and is contrary to the doctrine of *Rigsby* and *Cort.*

This Court in *Blue Chip Stamps, Rondeau* and *Cort* has reaffirmed that there are limits, founded on long-standing public policy and the judiciary's respect for the legislative powers of the Congress, to the authority of the federal courts to create new federal remedies for every perceived wrong. The SEC's amicus brief in *Hochfelder* agrees. The Court of Appeals' decision here to create two new federal causes of action marches in just the opposite direction and deserves this Court's review.

B. This Case Presents an Important Additional Aspect of the Scienter Issue Now Before This Court in the *Hochfelder* Case.

By granting a writ of certiorari in the *Hochfelder* case, this Court has recognized the importance of settling the widespread confusion between and within the Circuits with

respect to the degree of culpability necessary to establish liability for damages under the anti-fraud provisions of the 1934 Act.

The instant case, like *Hochfelder,* involves the fundamental question of whether a defendant may be held liable for money damages under the anti-fraud provisions of the 1934 Act in the absence of bad faith or intent to deceive. The *Hochfelder* case presents the issue in the context of a negligent failure to discover material facts. This case presents the issue in the context of an advertent business decision made in good faith and in reasonable reliance upon the unanimous opinion of expert legal and accounting advisers. Thus, the scienter issue presented by this case is one of even greater significance to the business community than the negligence question involved in *Hochfelder* because of the continuous need of business planners to base their decisions upon the professional advice of responsible experts.

Indeed, the most extraordinary feature of this extraordinary case is that massive and punitive damages were awarded despite the repeated findings by the District Court, echoed by the Court of Appeals, that BPC and its directors had acted in good faith and without intent to defraud or mislead. The District Court held that because BPC had received and was analyzing a proposal to purchase its BAR investment for less than the amount at which it was carried on BPC's financial statements, BPC should have disclosed in the prospectus for its exchange offer that such carrying value was "obsolete." (D-14) BPC's independent accountants as well as counsel for both BPC and First Boston knew of the purchase proposal. These experts had advised BPC and First Boston that because the discussions of a possible sale of the BAR were at a very preliminary stage and the legal, accounting and tax implications had not been explored or considered by the BPC Board of Directors, any reference to any possible disposition was not required by the securities laws and could prove misleading. Relying

upon this professional advice, BPC said nothing in its prospectus about the proposal it had received.

Based upon this evidence, the District Court held that CCI had failed to establish any "form of scienter" to support its claim for damages under Section 14(e) (A-144), finding as fact that the prospectus "was unintentionally in error" (A-143), and that:

> " . . . Bangor Punta did not intentionally or purposefully mislead Piper Aircraft stockholders or the public or investors by the omission to make disclosure of the sale under consideration nor did Bangor Punta or its directors intend to gain an advantage over Chris-Craft by the nondisclosure in the contest being waged for control. There was no purposeful connection between the nondisclosure and the contest for control of Piper. In other words, the nondisclosure was not prompted by an improper purpose." (D-14)

On appeal, all three judges agreed with the District Court's findings of fact as to BPC's and its directors' good faith and lack of intent to deceive.* (A-37, 47, 97-98, 117-123)

* Judge Timbers recognized that BPC's failure to describe the possible disposition of the BAR was not done "in bad faith" (A-47); at one point he referred to BPC's action as "negligence." (A-56) While at another point Judge Timbers said that BPC and its directors "showed reckless disregard for the importance of their activities concerning the BAR" (A-48), this was contrary to the findings of the District Court. Both Judge Mansfield and Judge Gurfein recognized that BPC acted in good faith. (A-97-100, 117-123) Judge Mansfield specifically noted:

> "[Judge Timbers'] characterization ignores the fact that under generally accepted accounting principles 'stated book value' may properly be used in a financial statement and is not viewed in the financial world as the equivalent of market value. A person able to read a balance sheet would probably have recognized that such 'historical' cost did not necessarily represent current liquidating value. Furthermore, to write down the figure immediately to $5 million might have been treated by the SEC as speculative and possibly misleading, in view of the other forms of disposition of BAR that were still under consideration." (A-122-123)

But the Court of Appeals then formulated a scienter test that circumvented these findings. It held that when a defendant knows a fact omitted from a prospectus, and a court later determines that such fact is material, nothing more need be shown. Scienter has been established, even though the defendant omitted the fact in the good faith belief—in reasonable reliance on expert advice—that the fact was not material and that disclosure was not required.

This test does not merely alter the scienter requirement, it eliminates it. Judge Friendly recognized this in *Gerstle* v. *Gamble-Skogmo, Inc.,* 478 F.2d 1281, 1301, n. 20 (2d Cir. 1973), where he stated that the *Chris-Craft II* scienter test "would result in virtually absolute liability" where the defendant is a corporation.*

The Court of Appeals did not apply this test to BPC only, but to BPC's two directors as well. It also deprived them of the "due diligence" defense Congress granted to them in Section 11(b)(3)(A) of the 1933 Act. Under that section, which provides an express cause of action for omissions in prospectuses, these individuals could have avoided liability by establishing that "after reasonable investigation" they had "reasonable ground to believe and did believe . . . that there was no omission to state a material fact required to be stated" in the prospectus.

---

* Mr. Justice Goldberg, in *SEC* v. *Capital Gains Research Bureau, Inc.,* 375 U.S. 180, 193 (1963), pointed out that in an implied cause of action for damages under the federal securities laws, an "intention to defraud or to misrepresent" was a well established element of proof. Similarly, in *SEC* v. *Texas Gulf Sulphur Co.,* 401 F.2d 833, 866-68 (2d Cir. 1968) (*en banc*), *cert. denied sub nom. Coates* v. *SEC,* 394 U.S. 976 (1969), Judge Friendly, concurring, sharply drew the line between the propriety of granting injunctive relief under Rule 10b-5 in the absence of proof of scienter, which he condoned, and the suggestion that scienter could be dispensed with in private damage actions, which he condemned.

When they act in good faith, companies and their officers and directors must be able to rely on expert professional advice. For the Court of Appeals to impose liability in such circumstances under statutes directed at "fraud" and "manipulative or deceptive devices" was a grievous error.*

C. The Court of Appeals Wrongly Interpreted This Court's Decisions in the *Mills* and *Ute* Cases to Create Irrebuttable Presumptions of Reliance and Causation of Injury, an Interpretation That Will Greatly Expand the Volume of Securities Litigation in the Federal Courts.

CCI sought damages for interference with its opportunity to compete for control of Piper. CCI never proved, however, that BPC's missteps deprived it of control or its opportunity to gain control. The District Court found, and the Court of Appeals agreed, that CCI did "not establish a nexus between the violations it charges and the damages it claims to have suffered" (A-147) and that CCI failed to establish "a reasonable probability that its defeat and damages were connected with the claimed violations." (A-145) And the Court of Appeals *en banc* in *Chris-Craft I* recognized that as of August 19, 1969—after both of BPC's alleged missteps—control was still available to either CCI or BPC. (C-9)

The Court of Appeals in *Chris-Craft II* ignored all this, however, and linked BPC's two missteps to CCI's injury by means of presumptions it derived—quite wrongly—

---

*This case also raises the question whether the same scienter requirements applicable in actions based on Rule 10b-5, like *Hochfelder,* are applicable in actions based on Rule 10b-6. Because Rule 10b-6 has wide application, this too is a question worthy of this Court's attention. There was no finding here by any court that BPC or its directors acted with intent to mislead or with any other form of scienter in making the purchases later held, in the first reported administrative or judicial application of the Rule in this situation, to have violated Rule 10b-6.

from two decisions of this Court, *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375 (1970), and *Affiliated Ute Citizens* v. *United States,* 406 U.S. 128 (1972). This expansion of *Mills* and *Ute,* if allowed to stand, will encourage additional litigation in the federal courts by permitting plaintiffs to recover vast sums by merely showing a technical violation of the securities laws, without proof that the violation caused any injury at all.

The Court of Appeals held that *Mills* and *Ute* required it to "presume that the Piper shareholders would not have accepted the BPC exchange offer but for the misrepresentations" concerning the BAR. (A-60) This holding alone raises serious questions, for it extends *Mills* and *Ute* to a plaintiff who has not himself relied on the misrepresentations and to whom the prospectus was not directed. The District Court did full justice to *Mills* and *Ute* when it ordered BPC to offer rescission to the Piper shareholders who exchanged their shares.

The Court of Appeals then went on to make an even more serious mistake, holding that *Mills* and *Ute* also required it to presume that BPC's violations actually injured CCI. This was wholly wrong. This Court in *Mills* carefully distinguished between a presumption of reliance, which it sanctioned, and a presumption of causation of injury, which it held plaintiff would still have to prove. Mr. Justice Harlan, writing in *Mills* for the Court, specifically noted that money "damages should be recoverable only to the extent that they can be shown." 396 U.S. at 389. This Court reaffirmed that principle in *Rondeau,* 95 S.Ct. at 2079, saying that "*Mills* could not be plainer in holding that the questions of liability and relief are separate in private actions under the Securities Laws, and that the latter is to be determined according to traditional principles."

In this case, the distinction between reliance and causation of injury is vital. Even if it is conclusively presumed

that every one of the seven percent of Piper shareholders who accepted BPC's exchange offer relied on the omission, there remains the established fact that at the end of the exchange offers the contest was still open. The post-exchange offer competition, and indeed the entire control fight, were determined by BPC's superior financial resources. As Judge Mansfield noted, "it was BPC's cash purchases in the open market of 100,614 shares, as compared with CCI's capacity to buy only 29,200 shares, that won control for BPC." (A-116)

In addition to reading *Mills* and *Ute* to establish presumptions they did not establish, the Court of Appeals appears to have held that those presumptions are irrebuttable. Yet neither *Mills* nor *Ute* says anything about making any presumption irrebuttable. On this point the Court of Appeals decision conflicts with that of the Third Circuit in *Rochez Bros., Inc.* v. *Rhoades,* 491 F.2d 402, 410 (3rd Cir. 1974), which held that *Ute* does not preclude consideration of reliance "at all in a non-disclosure case, but only that proof of reliance is not required for recovery." The question of whether the *Mills* and *Ute* presumptions are rebuttable, when properly applied, is an open one in the lower courts. *See* Note, *The Reliance Requirement in Private Actions Under SEC Rule 10b-5,* 88 Harv. L. Rev. 584, 600 (1975). This case provides an opportunity for this Court to settle that issue, among the other causation issues raised.*

* The Court of Appeals also appears to have relied on *Mills* and *Ute* to link BPC's technical violation of Rule 10b-6 to CCI's injury—again ignoring the trial court's findings. Judges Gurfein and Mansfield seem to have thought that any purchase that technically violates Rule 10b-6, if needed by one aspirant to acquire a majority of the target's stock, establishes causation as a matter of law. (A-96, 111) Whether this was based on *Mills* and *Ute* is not entirely clear from their opinions. Judge Timbers spelled out his view in the main opinion in *Chris-Craft II* in more detail. Citing *Mills* and *Ute,* he held that "Rule 10b-6 creates a presumption that illegal purchases will

D. The $36 Million Damage Award Vastly Exceeds Plaintiff's Actual Damages on Account of Petitioners' Acts and Thus Is Inconsistent with Section 28(a) of the 1934 Act and the Express Limitations of the 1933 Act.

In *Chris-Craft II*, BPC's actions were held to have denied CCI a fair opportunity to compete for control of Piper, and the Court of Appeals announced a formula to measure the damages for that injury. The opportunity for control was then valued by the District Court at about $1.7 million. In *Chris-Craft III*, the Court of Appeals adopted a new formula and raised the award to about $36 million (including prejudgment interest)—an amount that bears no relationship to the value of control of Piper, much less to the value of the mere opportunity to compete for control.

The Court of Appeals' latest formulation of the measure of damages is that BPC must pay to CCI "the difference between the price CCI paid for its Piper stock . . . and the price it could have obtained for it through a public offering after BPC unlawfully acquired control. . . ." (B-31) In other words, it ruled that a takeover aspirant who violates either Section 14(e) or Section 10(b) becomes an insurer of the other aspirant's pre-contest position. If, as was the case here, plaintiff paid more for the stock than it was intrinsically worth, defendant must make it whole for the difference, even though defendant did not induce the plaintiff's purchases. And if, as here, the market value of a target company's stock declines for reasons having nothing

---

substantially inflate the price of the security," and that a "reasonable investor is likely to rely on this inflation in deciding to accept the exchange offer." (A-66, n. 30) In addition to being unwarranted in fact, this statement stands *Mills* on its head. BPC, at most, committed a technical violation of Rule 10b-6's terms, though not its purposes. (A-148-151) BPC had urged that where the reason for the rule is inapplicable, the rule should not be applied. The Court of Appeals applied a converse canon: a person who commits any technical violation will be conclusively presumed to have contravened the purposes of the rule he violated.

to do with defendant's actions, defendant must make plaintiff whole for that decline too, even though defendant suffered the same decline on its stock in the target.

The complete divorce between what CCI was denied and the Court of Appeals' measure of damages is easily demonstrated. Even if CCI had succeeded in acquiring control of Piper, it would have suffered the same decline in the market value of its Piper holdings. CCI would have suffered the same decline in market value even if BPC had never entered the contest. Indeed, BPC, the "winner", suffered the very same "damages" the Court of Appeals ordered it to pay CCI as compensation for losing.

Section 28(a) of the 1934 Act specifically limits a plaintiff to recovery of "his actual damages on account of the act complained of." In a control contest where the "act complained of" is denial of the opportunity for control, Section 28(a) requires that plaintiff's damages be measured by the value of control and the lost opportunity to compete for it. The loss attendant on a decline in the market value of the acquired stock clearly does not constitute damage on account of the act complained of, since it falls on winner and loser alike. The Court of Appeals' damage formula thus plainly violates Section 28(a).

The *Chris-Craft III* damage formula also ignores the limits imposed by the 1933 Act, which (unlike Sections 10(b) and 14(e) of the 1934 Act) provides an explicit private remedy for an omission or misstatement in a prospectus. The 1933 Act both limits the maximum award (Section 11(g)) and permits any defendant to prove that the loss suffered by the plaintiff is due to factors other than the misstatement or omission (Section 11(e)). The damages awarded here violate both of these limitations. It is difficult to believe that Congress expressly established careful limits in the 1933 Act in order to have them ignored in judicially implied rights of action for the same violations

under the 1934 Act.* Indeed, the SEC has just said to this Court:

> "The private right of action to recover damages for violation of Rule 10b-5 is a judicially created remedy, designed to further the purposes of the federal securities laws. In determining whether damages should be awarded for a particular violation of Rule 10b-5, the limitations upon damage liability that Congress imposed in those sections of the federal securities laws that expressly provide for private damage suits for violations of those laws constitute an appropriate guideline for the courts in determining the scope of the implied action under Rule 10b-5." Brief of SEC as Amicus Curiae at 8-9 in *Ernst & Ernst* v. *Hochfelder, supra.*

The extraordinary damage formula applied below also contravenes the expressed intent of Congress in the Williams Act not to discourage tender bids or control contests. Any aspirant for control must now be prepared, if he is successful, to absorb not only his own loss should the stock of the target ultimately decline, but also, if he makes a good faith mistake, his opponent's market losses. This is a risk that can be expected to discourage rational businessman from entering such contests.

Finally, this case raises important questions concerning the relationship of money damages and equitable relief in securities cases. BPC has been enjoined for five years from voting 14% of the Piper shares, which gives CCI a majority of the voting power for this period. In addition, BPC has been required in the SEC action to offer former Piper shareholders the right to rescind the July 1969 ex-

* The anomaly of this result raises the fundamental question reserved by this Court in *Blue Chip Stamps:* whether an implied action under the 1934 Act will lie for violations subject to express civil remedies under the 1933 Act. 95 S.Ct. at 1933, n.15.

change by which BPC acquired 110,802 Piper shares. These rescission rights are assignable, and CCI could therefore obtain control of Piper through the acquisition of these rights and some additional purchases for a fraction of the $36 million it will receive if the judgment below stands. Neither the District Court in calculating damages, nor the Court of Appeals in recalculating damages itself, considered the effect of this equitable relief against BPC on CCI's damages. Yet if the goal of damages in this case is, as it must be under Section 28(a) of the 1934 Act, to compensate CCI, not to punish BPC, surely the effect of this equitable relief must be taken into account.

E. The Court of Appeals' Decision to Calculate Damages Itself Instead of Remanding for a Hearing After It Changed Its View of the Proper Measure of Damages and Its "Affirmance" of the Award of Prejudgment Interest After Vastly Increasing the Damages Denied Petitioners Due Process of Law.

In *Chris-Craft II,* the Court of Appeals held that CCI's injury was denial of the fair opportunity to compete for control of Piper and expressly directed that:

> "The measure of damages should be the reduction in the appraisal value of CCI's Piper holdings attributable to BPC's taking a majority position and reducing CCI to a minority position, and thus being able to compel a merger at any time." (A-69)

On remand, both sides presented evidence as to the reduction in appraisal value, offering the testimony of eight different experts. The District Court considered all the evidence presented, judged the credibility of each expert, made extensive findings of fact and concluded that CCI's damages were "generously valued" at $1,673,988. (B-70)

In *Chris-Craft III,* the Court of Appeals entirely changed its theory of damages and held instead that:

> ". . . the correct formula for determining CCI's damages is the difference between the price CCI paid for its Piper stock . . . and the price it could have obtained for it through a public offering after BPC unlawfully acquired control . . . ." (B-31)

Instead of remanding for a hearing to determine damages under the new measure, however, the Court of Appeals decided to calculate damages itself. First, it mistakenly assumed that CCI's cost could be taken directly from CCI's financial statements. It then assumed without argument that CCI would have had to register its Piper stock with the SEC before selling it—a questionable legal assumption.* Finally, on the basis of two paragraphs in the testimony of one witness who was not credited by the District Court, it decided that registration would take five months and that in a hypothetical public offering in January 1970, CCI could have obtained only $27 for each of its Piper shares. On this slim reed, the Court of Appeals increased damages fifteen-fold and ordered the entry of a final judgment against BPC for $25.8 million in damages.

By calculating damages itself on the basis of a small excerpt from a record prepared for a different purpose, the Court of Appeals prevented BPC from presenting evidence that would have shown that CCI's damages were substantially less than $25,793,365, even under the new theory of damages enunciated in *Chris-Craft III.* Had the Court of Appeals remanded this case to the District Court to make

---

* Registration would be required only if CCI were deemed a "controlling person" of Piper in spite of the fact that it lost the control contest. See Sections 2(11), 4(1) and 5 of the 1933 Act, 15 U.S.C. §§ 77b(11), 77d(1) and 77e. A recognized authority in this area has said that registration would not be required in a situation like the one here, since BPC, not CCI, had achieved control. Aranow & Einhorn, *Tender Offers for Corporate Control* 216 (1973).

the findings of fact appropriate to its new theory, BPC would have offered proof that:

(1) the date on which a sale by CCI could have occurred (a critical question of fact in a period of market decline*) was much earlier than January 1970;

(2) the price that CCI could have obtained for the shares on the date of the hypothetical sale was much greater than $27 per share;

(3) CCI's alleged cost of $63.98 per Piper share included interest, legal and other expenses not recoverable even under the new test; and

(4) the price of Piper stock, along with the prices of the stocks of other small-aircraft manufacturers and the market generally, declined sharply after the CCI and BPC purchases for reasons wholly unrelated to BPC's actions or to the takeover contest itself.

These facts became critical when the Court of Appeals adopted the new measure of damages because every one-dollar difference in the presumed cost or hypothetical sale price of a share of Piper stock changes the total judgment against BPC and its directors by $1 million.

This Court has consistently insisted that litigants be given their day in court on issues raised by a reversal of a lower court's decision. *E.g., Byrd* v. *Blue Ridge Cooperative,* 356 U.S. 525 (1958).** The Court of Appeals

---

* For example, the CCI witness relied on by the Court of Appeals testified that had the hypothetical sale been made in November 1969 instead of January 1970, CCI could have obtained about $33.00 per share; using this figure would have reduced damages under the Court of Appeals' new formula by almost $6 million including interest. (B-29, n. 22)

** As this Court said in *Byrd,* 356 U.S. at 533:

"The petitioner was fully justified in that circumstance in not coming forward with proof of his own at that stage of the proceedings, for he had nothing to meet under the District Court's view of the statute. He thus cannot be penalized by the denial of his day in court to try the issue under the correct interpretation of the statute."

justified not remanding this case to the District Court for new findings of fact on the basis of the length of time the case had already taken. (B-24) But far from serving the valid purpose of judicial economy, the Court of Appeals' decision here can only lead to a vast expansion of trial evidence submitted by litigants who cannot predict what the appellate court may deem relevant. Even more fundamentally, neither the Fifth Amendment nor the statute on which the Court of Appeals relied, 28 U.S.C. § 2106, sanctions depriving a defendant of the opportunity to present relevant evidence in his defense.

The Court of Appeals' action with respect to prejudgment interest compounded the denial of BPC's fundamental rights. The District Court had awarded prejudgment interest of approximately $600,000. This was "affirmed" by the Court of Appeals, without remand, into an award of prejudgment interest of approximately $10 million, after the Court of Appeals had awarded CCI vastly increased damages under the new damage formula.

This Court's only discussion of prejudgment interest in a securities case is found in *Blau* v. *Lehman*, 368 U.S. 403, 414 (1962), where, while affirming the denial of prejudgment interest, this Court said, quoting from *Board of Commissioners* v. *United States,* 308 U.S. 343, 352 (1939), that prejudgment interest " 'is given in response to considerations of fairness' " and " 'is denied when its exaction would be inequitable.' " Even the Court of Appeals has recognized that the amount of damages is an important factor to be weighed by the District Court in determining whether prejudgment interest would be equitable. *See Norte & Co.* v. *Huffines,* 416 F.2d 1189, 1191 (2d Cir. 1969), *cert. denied sub nom. Muscat* v. *Norte & Co.,* 397 U.S. 989 (1970). But the fifteen-fold increase in damages here, raising interest alone to about $10 million, was held (without argument) not even to require a remand for the exercise of the trial court's discretion in view of the changed circumstances.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinions of the Court of Appeals for the Second Circuit.

Respectfully submitted,

JAMES V. RYAN
ROGER L. WALDMAN
One Rockefeller Plaza
New York, New York 10020

LLOYD N. CUTLER
MANUEL F. COHEN
LOUIS R. COHEN
1666 K Street, N.W.
Washington, D. C. 20006

CHARLES ALAN WRIGHT
2500 Red River Street
Austin, Texas 78705

Counsel for Petitioners

C. KENNETH SHANK, JR.
ALLAN J. GRAF
Webster Sheffield Fleischmann Hitchcock & Brookfield

ARTHUR F. MATHEWS
MICHAEL S. HELFER
Wilmer, Cutler & Pickering

Of Counsel

September 5, 1975

APPENDIX

Section 10(b) of the 1934 Act, 15 U.S.C. § 78j(b) provides:

> "It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—
>
> * * *
>
> (b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors."

Section 14(e) of the 1934 Act, 15 U.S.C. § 78n(e), provides:

> "(e) It shall be unlawful for any person to make any untrue statement of a material fact or omit to state any material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, or to engage in any fraudulent, deceptive, or manipulative acts or practices, in connection with any tender offer or request or invitation for tenders, or any solicitation of security holders in opposition to or in favor of any such offer, request, or invitation. The Commission shall, for the purposes of this subsection, by rules and regulations define, and prescribe means reasonably designed to prevent, such acts and practices as are fraudulent, deceptive, or manipulative."

Section 28(a) of the 1934 Act, 15 U.S.C. § 78bb(a) provides:

"(a) The rights and remedies provided by this chapter shall be in addition to any and all other rights and remedies that may exist at law or in equity; but no person permitted to maintain a suit for damages under the provisions of this chapter shall recover, through satisfaction of judgment in one or more actions, a total amount in excess of his actual damages on account of the act complained of. Nothing in this chapter shall affect the jurisdiction of the securities commission (or any agency or officer performing like functions) of any State over any security or any person insofar as it does not conflict with the provisions of this chapter or the rules and regulations thereunder."

Section 11 of the 1934 Act, 15 U.S.C. § 77k, provides in pertinent part:

"(b) Notwithstanding the provisions of subsection (a) of this section no person, other than the issuer, shall be liable as provided therein who shall sustain the burden of proof—

* * *

"(3) that (A) as regards any part of the registration statement not purporting to be made on the authority of an expert, and not purporting to be a copy of or extract from a report or valuation of an expert, and not purporting to be made on the authority of a public official document or statement, he had, after reasonable investigation, reasonable ground to believe and did believe, at the time such part of the registration statement became effective, that the statements therein were true and that there was no omission to state a

material fact required to be stated therein or necessary to make the statements therein not misleading;

* * *

"(e) The suit authorized under subsection (a) of this section may be to recover such damages as shall represent the difference between the amount paid for the security (not exceeding the price at which the security was offered to the public) and (1) the value thereof as of the time such suit was brought, or (2) the price at which such security shall have been disposed of in the market before suit, or (3) the price at which such security shall have been disposed of after suit but before judgment if such damages shall be less than the damages representing the difference between the amount paid for the security (not exceeding the price at which the security was offered to the public) and the value thereof as of the time such suit was brought: *Provided,* That if the defendant proves that any portion or all of such damages represents other than the depreciation in value of such security resulting from such part of the registration statement, with respect to which his liability is asserted, not being true or omitting to state a material fact required to be stated therein or necessary to make the statements therein not misleading, such portion of or all such damages shall not be recoverable. In no event shall any underwriter (unless such underwriter shall have knowingly received from the issuer for acting as an underwriter some benefit, directly or indirectly, in which all other underwriters similarly situated did not share in proportion to their respective interests in the underwriting) be liable in any suit or as a consequence of suits authorized under subsection (a) of this section for damages in excess of the total price at which the securities underwritten by him and distributed to the public were offered to

the public. In any suit under this or any other section of this subchapter the court may, in its discretion, require an undertaking for the payment of the costs of such suit, including reasonable attorney's fees, and if judgment shall be rendered against a party litigant, upon the motion of the other party litigant, such costs may be assessed in favor of such party litigant (whether or not such undertaking has been required) if the court believes the suit or the defense to have been without merit, in an amount sufficient to reimburse him for the reasonable expenses incurred by him, in connection with such suit, such costs to be taxed in the manner usually provided for taxing of costs in the court in which the suit was heard.

* * *

"(g) In no case shall the amount recoverable under this section exceed the price at which the security was offered to the public."

Rule 10b-6 under the 1934 Act, 17 C.F.R. § 240.10b-6, provides in pertinent part:

> "(a) It shall constitute a 'manipulative or deceptive device or contrivance' as used in section 10(b) of the act for any person, . . .
>
> (2) Who is the issuer or other person on whose behalf such a distribution is being made . . .
>
> directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange, either alone or with one or more other persons, to bid for or purchase for any account in which he has a beneficial interest, any security which is the subject of such distribution, or any security of the same class and series, or any right to purchase any such security, or to attempt to induce any person to purchase any such security or right, until after he has completed his par-

ticipation in such distribution: *Provided, however,* that this section shall not prohibit . . . (ii) unsolicited privately negotiated purchases, each involving a substantial amount of such security, effected neither on a securities exchange nor from or through a broker or dealer; . . .

* * *

(b) The distribution of a security (1) which is immediately exchangeable for or convertible into another security, or (2) which entitles the holder thereof immediately to acquire another security, shall be deemed to include a distribution of such other security within the meaning of this section. . . ."

No. 75-355

In The

Supreme Court of the United States

October Term, 1975

BANGOR PUNTA CORPORATION, NICOLAS M. SALGO
AND DAVID W. WALLACE,
Petitioners,

v.

CHRIS-CRAFT INDUSTRIES, INC., *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONERS BANGOR PUNTA CORPORATION, NICOLAS M. SALGO AND DAVID W. WALLACE

JAMES V. RYAN
ROGER L. WALDMAN
One Rockefeller Plaza
New York, New York 10020

LLOYD N. CUTLER
MANUEL F. COHEN
LOUIS R. COHEN
1666 K Street, N.W.
Washington, D. C. 20006

CHARLES ALAN WRIGHT
2500 Red River Street
Austin, Texas 78705

Counsel for Petitioners

C. KENNETH SHANK, JR.
ALLAN J. GRAF
Webster Sheffield Fleischmann
Hitchcock & Brookfield

ARTHUR F. MATHEWS
MICHAEL S. HELFER
Wilmer, Cutler & Pickering

Of Counsel

IN THE

Supreme Court of the United States

October Term, 1975

No. 75-355

BANGOR PUNTA CORPORATION, NICOLAS M. SALGO AND DAVID W. WALLACE,

Petitioners,

v.

CHRIS-CRAFT INDUSTRIES, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONERS BANGOR PUNTA CORPORATION, NICOLAS M. SALGO AND DAVID W. WALLACE

This brief is submitted by Petitioners Bangor Punta Corporation ("BPC"), Nicolas M. Salgo and David W. Wallace in reply to the Brief for the Respondent in Opposition to the Petitions for Certiorari submitted on behalf of Chris-Craft Industries, Inc. ("CCI") on October 20, 1975.

I

This case presents several important legal questions. CCI attempts to bury these questions, which the Court of Appeals itself found important and troubling,* by claiming, over and over, that this case involves "admitted" "massive" "fraud." CCI's claims, however, are wholly belied by the record.

The judgment against BPC was based entirely on two alleged violations, both of which were technical and in good faith, and neither of which was ever "admitted."** The first was a violation of Rule 10b-6. The District Court held that BPC's actions were not covered by the Rule. The Court of Appeals, over a strong dissent, disagreed on the law. But the Court of Appeals did not disturb the explicit findings of the District Court on remand that there was "not a scintilla of evidence that any Piper holder was misled" and that BPC's actions were "well within the spirit," although not the "literal terms," of an exemption from the Rule. (A-151) There was no fraud involved.

CCI's repeated assertions that BPC "defied" SEC warnings concerning Rule 10b-6 (*e.g.*, Response at 9) are also false. As a check of CCI's citations will show, the supposed SEC warnings to BPC consisted entirely of a private meeting between the SEC staff and a Mr. Siegel of CCI, of which BPC was unaware (A-13), plus an SEC press release proposing a new SEC Rule 10b-13, which rule is not involved in this action. (A-15-16) The SEC release

---

* *Chris-Craft I* was reheard by the Court of Appeals *en banc* and produced a powerful dissent. *Chris-Craft II* produced separate opinions from each of the three judges who heard it, and Judge Timbers began the principal opinion by stating that the case "present[ed] important questions, some of first impression . . . ." (A-6)

** CCI's repeated assertion that the two violations are "admitted" by BPC is a misstatement. BPC believes, as very clearly stated in its Petition at 14, that "the decisions below on these points are wrong and that [BPC's] actions . . . were lawful."

commented briefly on the coverage of existing Rule 10b-6, but neither the parties nor any court ever found any precedent supporting that comment. (C-16) As Judge Lumbard noted on this specific issue, BPC "did not then know of any rule or interpretation precluding the transactions."* (C-22)

BPC's alleged violation of Section 14(e), the only other support for the judgment, did not involve fraud either. BPC omitted to describe an offer for the BAR that it had received and was considering. The District Court explicitly found that BPC "did not intentionally or purposefully mislead" Piper stockholders and that the omission "was not prompted by an improper purpose." (D-14) This explicit rejection of any claim of fraud was accepted by the Court of Appeals (A-37), which said: "Nor does the evidence show that BPC failed to disclose the sales negotiations in bad faith." (A-47)

CCI also carefully confuses the causation issue. The central fact is that after both of BPC's alleged violations, the contest for control of Piper was still open.** (C-9) CCI attempts to create the impression that without the technical violations BPC would not have acquired any of the shares involved and CCI would have acquired these shares. But the District Court found that there was no such proof. (A-145, 147) The Court of Appeals' assumption that BPC would not have acquired the Piper shares at issue arose solely from its interpretation of *Mills* and *Ute*. The

---

* Nor did BPC buy Piper shares in "defiance" of its lawyers' advice, as CCI asserts. (Response at 23) As the record reference cited by CCI shows, it was the opinion of both BPC's in-house counsel and its outside counsel that the Rule did *not* apply to purchases of Piper stock by BPC. (1645A) Counsel advised that, taking "a conservative position," it would be "proper to buy shares of [Piper] but only if they were unsolicited and not over an exchange."

** CCI's assertion that "all the experts agreed" that BPC's 45-41% lead put BPC "realistically in an unbeatable position" (Response at 25-26) is wrong. Plaintiff's expert testified that the contest in August was a bidding contest, with victory available to the highest bidder. (2481A) Defendants' expert testified that BPC's 4% lead was not insurmountable. (2877A)

quotation relied upon by CCI (Response at 10) misleadingly omits the critical language which makes this clear. The full quotation is as follows:

> "Under the *Mills-Ute* test, we must presume that BPC's offer was not so appealing, considering the BAR loss, as to have attracted any takers." (A-60, omissions underscored)

Thus, despite CCI's attempts at camouflage, the causation issue, like the other issues presented in BPC's Petition, is a recurring and important legal question worthy of this Court's attention.

II

CCI makes almost no response to the important legal questions presented by BPC's Petition.

Standing Under Rule 10b-6. This case presents the important question whether, under *Blue Chip Stamps,* CCI has an implied right of action for damages under Rule 10b-6. CCI neither bought nor sold the *BPC* securities that were the subject of the "distribution" that Rule 10b-6 regulates. CCI's argument that it would have been unlawful for CCI to have purchased *Piper* securities (Response at 21) is wholly irrelevant, since these were not the securities being distributed. CCI's argument that if it was injured it must have standing was, of course, rejected in *Blue Chip Stamps,* 95 S. Ct. at 1926-27.

Standing Under Section 14(e). This case presents the important question whether, under *Rigsby, Cort* and *Rondeau,* CCI has an implied right of action for damages under Section 14(e). CCI's only response is to assert that, although the prospectus was not directed at CCI, and CCI did not accept the offer made by it, CCI has an implied right of action because "Section 14(e) protects *all* parties involved in a control contest." (Response at 20) CCI purports to derive its conclusion from *Rondeau* and some legislative history, neither of which provides CCI any support whatsoever. If CCI were right, then each contestant in a takeover contest could sue each of the other contestants,

the target and its management; shareholders of the target could sue the target and each contestant; and anyone else "involved" could sue too. Surely this Court will want to decide whether all these causes of action can properly be implied from Section 14(e), in disregard of *Rigsby* and *Cort.*

Scienter. This case presents the important question whether scienter to support an implied damage action under the 1934 Act exists where there has been a trial court finding, undisturbed on appeal, that the defendant acted in good faith and without intent to defraud or mislead. (A-37, 47, 97-100, 117-123; D-14) While *Chris-Craft II* contains an extended theoretical discussion of scienter with several different formulations of the standard, the holding was that mere knowledge of an omitted fact later held material is sufficient to support damage liability, no matter how careful or otherwise blameless the defendant was. (A-37, 106-107) This legal, not factual, conclusion is of first importance.

Causation. This case presents the important question whether CCI has the right to a presumption, in the face of an explicit contrary finding by the trier of fact (A-145, 147), that in the absence of BPC's violations BPC would have acquired none of the 14% of Piper stock involved. CCI explicitly and repeatedly begs this question by itself presuming that absent the technical violations BPC would never have acquired any such stock. Whether there should be a presumption of that kind is precisely the legal question presented, and it is one of major importance to the continuing development of the *Mills* doctrine.

Damages. CCI makes no effort to explain how the Court of Appeals' measure of damages is related—as it must be under Section 28(a) of the 1934 Act—to the actual damages suffered by CCI on account of the denial of CCI's opportunity to compete for control. CCI's only response is to assert, repeatedly and falsely, that BPC does not challenge the legal principles used by the Court of Appeals to determine damages. (Compare Response at 35 with Petition at 27-30.) CCI's reluctance to discuss the measure of dam-

ages undoubtedly stems from the District Court's finding, after a trial, that the majority position in Piper was worth at most 10% more than the minority block and that CCI's *opportunity* to gain control was "generously valued at 5% above fair value of the [Piper] stock" (B-70)—sums that are a small fraction of the $36 million awarded. CCI's attempt to portray the Court of Appeals' fifteen-fold increase in damages (giving CCI many times more than it would now have if it had won the contest) as a matter of "arithmetic," rather than a last-minute change of theory, is clearly indefensible.

Conclusion

For the reasons stated in the Petition, a writ of certiorari should issue.

Respectfully submitted,

James V. Ryan
Roger L. Waldman
One Rockefeller Plaza
New York, New York 10020

Lloyd N. Cutler
Manuel F. Cohen
Louis R. Cohen
1666 K Street, N.W.
Washington, D. C. 20006

Charles Alan Wright
2500 Red River Street
Austin, Texas 78705
Counsel for Petitioners

C. Kenneth Shank, Jr.
Allan J. Graf
Webster Sheffield Fleischmann Hitchcock & Brookfield

Arthur F. Mathews
Michael S. Helfer
Wilmer, Cutler & Pickering
Of Counsel

October 28, 1975

IN THE
Supreme Court of the United States
OCTOBER TERM, 1975

No. 75-355

BANGOR PUNTA CORPORATION, NICOLAS M. SALGO, AND DAVID W. WALLACE,
Petitioners,
v.
CHRIS-CRAFT INDUSTRIES, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR PETITIONERS

LLOYD N. CUTLER
MANUEL F. COHEN
LOUIS R. COHEN
STEPHEN F. BLACK
WILLIAM T. LAKE
MICHAEL S. HELFER
WILLIAM J. KOLASKY, JR.

WILMER, CUTLER & PICKERING
1666 K Street, N.W.
Washington, D.C. 20006

Counsel for Petitioners

JAMES V. RYAN
ROGER L. WALDMAN
C. KENNETH SHANK, JR.
ALLAN J. GRAF

WEBSTER & SHEFFIELD
One Rockefeller Plaza
New York, New York 10020

CHARLES ALAN WRIGHT
2500 Red River Street
Austin, Texas 78705

Of Counsel

DUDLEY C. PHILLIPS
JOHN J. MARTIN
One Greenwich Plaza
Greenwich, Connecticut 06830

INDEX

INDEX—Continued

INDEX—Continued

TABLE OF AUTHORITIES

CASES: Page

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-355

BANGOR PUNTA CORPORATION, NICOLAS M. SALGO, AND DAVID W. WALLACE,

Petitioners,

v.

CHRIS-CRAFT INDUSTRIES, INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the District Court for the Southern District of New York on the issue of liability is reported at 337 F. Supp. 1128 and is reprinted in the Appendix at A-125-162.* The opinion of the court of appeals on

---

* The Appendix volume in this Court is divided into sections A through F, and "A", "B", "C", "D", "E", and "F" page references are to the sections of that volume. The printed Appendix in the court of appeals is cited as "App.", except for the exhibit volumes which are cited "EV".

the issue of liability (A-1-124) is reported at 480 F.2d 341 (*"Chris-Craft II"*). The opinion of the district court on relief (B-43-80) is reported at 384 F. Supp. 507. The opinion of the court of appeals on relief (B-1-42) is reported at 516 F.2d 172 (*"Chris-Craft III"*).

Prior opinions of the district court (C-32-48) and the court of appeals (C-1-31) relating to an application for a preliminary injunction are reported at 303 F. Supp. 191 and 426 F.2d 569, respectively (*"Chris-Craft I"*). The opinions of the district court in the connected cases of *SEC* v. *Bangor Punta Corporation* (D-1-21) and *Bangor Punta Corporation* v. *Chris-Craft Industries, Inc.* (D-22-34) are reported at 331 F. Supp. 1154 and 337 F. Supp. 1147, respectively.

JURISDICTION

The judgment of the court of appeals was entered on April 11, 1975 (E-1-2), and a timely petition for rehearing was denied on June 9, 1975. (E-3, E-6) The Petition for a Writ of Certiorari was filed on September 5, 1975, and was granted on April 5, 1976. 96 S. Ct. 1505. This Court has jurisdiction under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Is there an implied private federal cause of action for damages in favor of one takeover aspirant against another—

(a) under Section 10(b) of the Securities Exchange Act of 1934 ("1934 Act") and Rule 10b-6 thereunder, where the plaintiff neither bought nor sold the securities involved in the alleged violation, or

(b) under Section 14(e) of the 1934 Act, on account of an omission from a prospectus for an exchange offer, where the plaintiff is not suing as a target company shareholder, the class Section 14(e) was designed to protect?

2. If there are such implied causes of action, may the plaintiff recover damages where the defendants' actions involved no intent to deceive, manipulate, or defraud and no recklessness?

3. If there are such implied causes of action, is one takeover aspirant entitled to conclusive presumptions that (a) the other aspirant's exchange offer would not "have attracted any takers" but for an omission from its prospectus and (b) the other aspirant's violations decided the contest, despite findings by the district court that neither reliance nor causation had been proved?

4. If there are such implied causes of action, is a takeover aspirant that is neither induced to buy nor forced to sell shares of the target company entitled to a rescission measure of damages that compensates it for its own misjudgment of the worth of the target and for an unrelated market decline?

5. May a court of appeals that formulates a different measure of damages than that employed by the district court decide not to remand for a hearing, and instead fix the damages itself by using excerpts from the record created for the purpose of determining damages under the other measure of recovery, thereby increasing damages from $1.7 million to $25.8 million and increasing prejudgment interest from $600,000 to nearly $10 million?

STATUTES AND REGULATIONS INVOLVED

Section 10(b) of the 1934 Act, 15 U.S.C. § 78j(b); Section 14(e) of the 1934 Act, 15 U.S.C. § 78n(e); Section 28(a) of the 1934 Act, 15 U.S.C § 78bb(a); Act of June 25, 1948, c. 646, 62 Stat. 963, 28 U.S.C. § 2106; Rule 10b-5 under the 1934 Act, 17 C.F.R. § 240.10b-5; and Rule 10b-6 under the 1934 Act, 17 C.F.R. § 240.10b-6, are set forth in an Addendum to this Brief.

STATEMENT OF THE CASE

This case arises out of a "sophisticated and hard fought" (A-127) contest for control of Piper Aircraft Corporation ("Piper"). The "winner," Bangor Punta Corporation ("BPC"), was found to have committed two technical and unintentional violations of the 1934 Act during the contest. These missteps were presumed (but not shown) to have denied the "loser," Chris-Craft Industries, Inc. ("CCI"), a fair chance to compete for control. BPC was held liable—jointly and severally with two of its directors, three members of the Piper family and Piper's financial adviser—to pay CCI, which still owns 43% of Piper, nearly $36 million (including prejudgment interest). The judgment equals approximately the entire net shareholders' equity of Piper and far exceeds what CCI would now have if it had won.

1. The Contest for Control of Piper

CCI began acquiring Piper shares in December 1968. By January 23, 1969, CCI had acquired approximately 203,000 Piper shares (12.4%) through transactions on the New York Stock Exchange and through a private purchase from an institutional investor. Table at p. 9, Item 1. On that date CCI publicly announced a cash tender offer for 300,000 Piper shares at $65 per share.

Piper's management decided to oppose CCI's tender offer. On January 27 and 28, 1969, Piper sent letters to its shareholders advising them not to tender. On January 29, 1969, Piper announced an agreement to sell 300,000 unissued Piper shares to Grumman Aircraft Engineering Corporation. (The agreement was terminated on March 17, 1969.) These letters and the announcement were later held to violate Section 14(e) and are the basis for the liability of the individual Piper family defendants. (B-5, 9)

Despite Piper's opposition, CCI's January tender offer was successful (A-12), bringing CCI 304,000 shares. Table, Item 2. CCI made additional cash purchases of Piper shares during its tender offer, and by February 3, 1969 it owned a total of 547,106 Piper shares (33%), bought at a cost of about $35 million. (A-128) With "[i]ts cash resources . . . virtually exhausted" (A-114), CCI announced late in February, after the close of its cash tender offer, its intention to make an exchange offer to Piper shareholders. (A-12)

Between January and mid-April 1969, BPC was twice approached by Piper's investment adviser, the First Boston Corporation ("First Boston"), about the possibility that BPC might acquire control of Piper. But it was not until after CCI's tender offer had been successfully completed (and the Pipers' alleged violations had been committed) that BPC first met with any Piper official. Serious negotiations between BPC and the Piper family did not begin until late in April, by which time CCI owned 33.8% of Piper. Table, Item 3.

On May 8, 1969, BPC agreed to purchase the entire interest of the Piper family, about 31% of the outstanding shares, for a package of BPC securities valued by First Boston at $70-$72 per Piper share. Table, Item 4.

BPC also promised to use its best efforts to acquire a majority of Piper's shares by offering all Piper shareholders a package of BPC securities with a value of at least $80 per Piper share, and, if successful in that effort, to give the Piper family (in BPC securities or in cash) the difference between the value of the securities they had received and $80. (A-14-15)

A few days after purchasing shares from the Piper family, BPC was offered a total of 98,600 Piper shares at approximately $80 per share by two institutional investors. BPC accepted the offers, bought the shares in off-exchange transactions, and promptly disclosed them to the public on May 16, 1969. During the following week BPC purchased an additional 21,600 Piper shares from another institutional investor in another off-exchange transaction, which was also promptly disclosed to the public. (A-16; App. 374A; EV 1092) After making these cash purchases (totaling 7% of the Piper stock, see Table, Item 5), BPC had a 4% lead over CCI with almost 30% of the Piper shares still in public hands. These purchases were made with the advice of counsel that they were lawful (App. 1644A-45A) and were found to have had no market effect. (A-152) Nevertheless, the purchases were later held to have been in technical violation of Rule 10b-6, in the first reported administrative or judicial application of that rule to the purchase of target company shares.

CCI's exchange offer began in mid-May. The 1969-70 stock market decline intervened, however, and the prices of CCI's securities, which it was offering in exchange, declined rapidly, making the exchange offer increasingly unattractive. CCI renewed the offer several times but never supplemented the original package of securities to make it competitive with BPC's prospective offer. The

result was that CCI's offer never attracted even the minimum number of shares (80,000) that CCI had set as a condition of accepting any of the Piper shares tendered. The offer was withdrawn on July 24. (A-17) Table, Item 6.

On July 18, 1969, BPC's exchange offer became effective. It remained open until July 29, attracting 110,802 Piper shares, all of which BPC accepted. CCI in the meantime had registered another exchange offer, which opened on July 24 and closed on August 4, attracting 112,089 Piper shares. The district court found that during the period in which the offers overlapped, BPC's package had a market value ranging between $79.93 and $73.37; by contrast, CCI's package ranged between $75.50 and $63.25. (A-140 n. 10) At the close of the competing exchange offers, BPC retained a 4% lead with 15% of the stock still in the hands of public stockholders. Table, Items 7, 8. The prospectus that was used in BPC's exchange offer was later held to have been unintentionally in error, on a matter that did not affect the value of BPC's offer. (A-140)

At this point, neither aspirant had control of Piper. The district court specifically found that, as late as August 19, 1969, control was available to either BPC or CCI, and accordingly denied CCI's request for preliminary injunctive relief against future purchases by BPC, saying:

> Neither party has gained control of Piper, and both are still in a position to do so. (C-47)

The court of appeals en banc affirmed this conclusion in *Chris-Craft I* and went on to say that in mid-August 1969, CCI was not "at any real disadvantage" in the contest:

> [W]e conclude that the district court did not err in refusing to enjoin the continued solicitation of stock by Bangor Punta. At that time Chris-Craft was free to compete equally with Bangor Punta for the remaining Piper shares, and it did so. We do not understand Chris-Craft to allege that prior misdeeds of Bangor Punta so determined the course of the competition for shares after the date of the decision below that Chris-Craft was placed at any real disadvantage. (C-9)

In short, after the exchange offers, control was available in the market to the higher bidder. CCI spent about $2 million to purchase 29,200 Piper shares, giving it 42%; it then voluntarily "withdrew from the battle." (B-7) BPC, with its superior financial resources, purchased an additional 100,614 Piper shares for over $7 million, reaching a total of 51% on September 5, 1969. Table, Items 9, 10. BPC then stopped making purchases because it had a majority. Apparent control of Piper had, appropriately, gone to the higher bidder.

SUMMARY OF THE CONTEST FOR CONTROL

Total Piper Shares Outstanding 1,644,790

Acquisition of Piper Shares					Cumulative Percentage of Piper Shares Owned		
Buyer	Type of Acquisition	Dates	No. of Shares	% of Total	CCI	BPC	Public
1. CCI	cash purchases	12/30/68-1/22/69	203,700	12.4%	12.4%	0%	87.6%
2. CCI	cash tender offer	1/23/69-2/ 3/69	304,606	18.5%	30.9%	0%	69.1%
3. CCI	cash purchases	1/23/69-4/ 7/69	47,900	2.9%	33.8%	0%	66.2%
[MAY 8: BPC ENTERED CONTEST]							
4. BPC	sale by Piper family	5/ 8/69	501,090	30.5%	33.8%	30.5%	35.7%
5. BPC	cash purchases	5/14/69-5/23/69	120,200	7.3%	33.8%	37.8%	28.4%
[MAY 22: THIS LITIGATION BEGAN]							
6. CCI	exchange offer	5/15/69-7/24/69			WITHDRAWN		
7. BPC	exchange offer	7/18/69-7/29/69	110,802	6.7%	33.8%	44.5%	21.7%
8. CCI	exchange offer	7/24/69-8/ 4/69	112,089	6.8%	40.6%	44.5%	14.9%
9. CCI	cash purchases	8/12/69-8/18/69	29,200	1.8%	42.4%	44.5%	13.1%
[AUGUST 19: PRELIMINARY INJUNCTION DENIED; CCI "WITHDREW FROM THE BATTLE"]							
10. BPC	cash purchases	8/ 8/69-9/ 5/69	100,614	6.1%	42.4%	50.6%	7.0%

2. The Litigation

a. *The Initial Decisions*

This action was commenced on May 22, 1969. In its first amended complaint, CCI alleged that BPC's private purchases of 120,200 Piper shares in May 1969 violated Rule 10b-6, which prohibits a person participating in the distribution of a security from acquiring that security or any right to acquire that security. CCI's theory was that BPC, having announced its intention to offer BPC securities in exchange for Piper shares, was engaged in the distribution of BPC securities; that Piper stock represented a right to acquire BPC securities in the exchange offer itself; and that BPC was therefore prohibited by Rule 10b-6 from purchasing Piper stock. The district court held that Rule 10b-6 did not apply to BPC's purchases, since purchases of Piper stock could not have the prohibited effect of artificially stimulating the market value of the BPC securities in distribution. (C-45) CCI's request for a preliminary injunction preventing BPC from purchasing additional Piper shares was denied.*

In *Chris-Craft I* the denial of the preliminary injunction was affirmed. However, a majority of the court of appeals disagreed with the district court's interpretation of Rule 10b-6, and held that purchases of a target com-

---

* CCI also alleged in its first amended complaint that the press release issued by Piper and BPC on May 8, 1969, which included the statement that BPC intended to offer "Bangor Punta securities to be valued in the judgment of The First Boston Corporation at not less than $80 per Piper share," violated Section 5(c) of the Securities Act of 1933 ("1933 Act"), 15 U.S.C. § 77e(c), by going beyond Rule 135, 17 C.F.R. § 230.135, which specifies the information that may be published before the filing of a registration statement. Since the statement was entirely accurate, the court of appeals, like the district court, found that CCI had not been damaged by the release. (A-42-43) This issue is no longer involved in this case.

pany's stock by a company that plans to make an exchange offer for that stock constitute purchases of rights to acquire the maker's own stock within the meaning of the rule. Chief Judge Lumbard dissented vigorously, arguing that "the majority would stretch the wording of [Rule] 10b-6 beyond anything that courts, commentators, and—in published actions—the [Securities and Exchange Commission] had considered included until this case." (C-28) The case was remanded to the district court for further proceedings to determine whether an exemption was available.

b. *The Decisions on Liability*

After remand, CCI filed a second amended complaint, adding to its Rule 10b-6 charge the allegation that the prospectus for BPC's July 1969 exchange offer had failed to disclose an alleged agreement to sell BPC's shares of the Bangor and Aroostook Railroad ("BAR") at a price lower than BPC's book value for that investment. CCI claimed that because of this alleged omission, the prospectus violated Section 14(e) of the 1934 Act. Shortly thereafter, the Securities and Exchange Commission ("SEC") brought an action against BPC based on the same alleged omission. The SEC sought an injunction requiring BPC to offer rescission to the former Piper shareholders who had exchanged their shares, plus a general injunction against future securities law violations.

The CCI and SEC actions were tried together. The evidence established that at the time of the exchange offer BPC had *not* agreed to sell its investment in the BAR to anyone. BPC had received an offer for the BAR, which it had considered; but BPC had "decided to table the entire matter" (D-8) pending completion of an investigation of the legal, accounting and tax implica-

tions of various forms of disposing of the BAR, particularly the financial consequences of a sale of stock as compared to a sale of assets. The evidence further established that counsel for BPC and First Boston had reviewed the status of the BAR with BPC and First Boston executives. (A-48; App. 1657A-59A) Since there had been no decision to sell and since the financial effect of any disposition of the BAR would depend on the form of the transaction (which was still being studied), no one suggested that disclosure of possible disposition was required. BPC's independent accountants were also fully aware of the negotiations concerning the BAR when they permitted the use of their opinion in the exchange offer prospectus. (App. 1759A-61A; EV 87, 89) BPC finally agreed to a sale of its BAR stock for cash on October 2, 1969, more than two months after the close of BPC's exchange offer. (D-6-13)

In the SEC case, the district court ruled that the evidence "unequivocally negate[d]" (D-11) the existence of any agreement to sell the BAR and that BPC had not "consciously concealed, deferred or refrained from going forward with [the] offer [for the BAR] in order to circumvent disclosure" in the exchange offer prospectus. (D-12) There was at the relevant time no "reasonable probability" of a sale. (D-13) However, the court advanced a theory neither the SEC nor CCI had relied on: that the offer of $5 million for BPC's interest in the BAR made the carrying value of $18.4 million on BPC's balance sheet "obsolete." (D-14) Applying a "standard of materiality" that turned on whether "a reasonable stockholder of Piper might have hesitated to" accept BPC's exchange offer if he had known of the possible disposition of the BAR (D-15), the district court held that although BPC did not "intentionally or purposefully mislead" any-

one (D-14), the prospectus was unintentionally misleading because of the failure to mention the offer. In order to "correc[t] [the prospectus] for those to whom it related" (A-143), the district court ordered BPC to offer rescission to all Piper shareholders who had accepted its exchange offer.* The court denied the SEC's request for an injunction against future violations because it found no "bad faith" on the part of BPC. (D-16-17)

In CCI's case the district court, after trial, dismissed the complaint without reaching the question whether CCI had standing to sue BPC under Section 14(e). With respect to CCI's claim based on the BAR omission, it repeated the conclusion it had reached in the SEC case: the prospectus was "unintentionally in error" (A-143) because of a "mere negligent omission." (A-148) Therefore, CCI had failed to prove any "form of scienter." (A-144) The district court also held that CCI had failed to show any "causal relation between the deficiency and the harm complained of." (*Id.*)

CCI's case (but not the SEC's) also involved the alleged Rule 10b-6 violation. As to that, the evidence showed that BPC's in-house and outside counsel had advised it that the rule did not apply to purchases of Piper stock by BPC under the circumstances. (App. 1644A-46A) BPC's counsel knew that in a May 5, 1969 release the SEC had circulated for public comment a proposed new Rule 10b-13 to deal explicitly with purchases of a target company's stock by a tender offeror. Although the new rule would not become effective until November 1969, the SEC's May release had asserted that the new rule was "in effect a codification of existing interpretations under Rule 10b-6." But not one such published interpretation,

* The rescission offer was made. It was not accepted by any former Piper shareholder.

administrative or judicial, was ever found. (C-28-31, 44-46)

The district court, bound by *Chris-Craft I*, found that BPC's cash purchases in May were "technical" (A-149) violations of Rule 10b-6, though "well within the spirit" (A-151) of one of the many exemptions from the rule. It also found that the purchases—all in large blocs, all off-the-exchange, and all promptly announced—had not "acted to produce or heighten a stimulating effect on the market" (A-152), and had not misled CCI or any Piper shareholder. (A-151) The district court also found that there was "no basis for concluding that, absent Bangor Punta's acquisition of these blocks, Chris-Craft would have achieved its goal of control." (A-150)

On appeal (*Chris-Craft II*), the court of appeals reversed and remanded.* It held that CCI, as one aspirant for control of Piper, had implied causes of action for damages against BPC, another aspirant, under both Rule 10b-6 and Section 14(e). The court of appeals acknowledged that BPC's violations were technical and not made in bad faith. (A-37, 47, 97-100, 117-123) It also acknowledged that there was no evidence that CCI could ever have gained control of Piper, even if the defendants had not violated the law. (A-56, 66) Nevertheless, the court of appeals held that the violations would be legally presumed to have injured CCI by denying it a "fair opportunity to compete for control." (A-60)

The court of appeals then directed the district court to enjoin BPC from voting either bloc of Piper shares for five years, so that BPC would (as it does today) have the power to vote only 37% of the shares

* The district court's decision in the SEC action—ordering BPC to offer rescission but denying the broad injunction the SEC sought —was affirmed. (A-94-95)

against CCI's 42%. In addition to this injunction and the rescission offer that was ordered in the SEC case, the court of appeals directed that the district court determine the money damages CCI suffered by being deprived of a "fair opportunity to compete for control" of Piper by BPC and the other defendants.

c. *The Decisions on Damages*

On remand, the district court heard and evaluated extensive expert testimony on the value of CCI's lost opportunity. After analyzing the factors that give value to control, the district court found that the value of control would be no more than 10% over the fair market value of Piper stock on September 5, 1969, the day BPC acquired 51% of Piper. The fair market value on that date, the district court found, was $48 per share; the value of control was therefore $4.80. Since CCI lost at most an opportunity to gain control, its damages were "generously valued" at $2.40 per Piper share, for a total of $1,673,-988. (B-70) In addition, the district court awarded prejudgment interest, which totaled $599,011. (B-76-79)

On appeal (*Chris-Craft III*), the court of appeals deemed this judgment for more than $2 million "quite insubstantial" (B-17), and took the following steps to enlarge it:

First, the court of appeals disregarded the fact that CCI's injury was a supposed interference with its opportunity to gain control of Piper and held that the measure of damages was the difference between the historical cost of CCI's Piper shares and the price at which CCI could theoretically have sold the stock by a public offering in a severely depressed market five months after BPC acquired control. It did so even though (a) CCI was

not induced to buy a single Piper share by BPC and retained every share of Piper it had bought during the contest; (b) the historical cost of CCI's Piper shares greatly exceeded their value (as found by the district court) at the time the court of appeals deemed relevant; (c) CCI had not proved that BPC would have lost or that CCI could have won control under any circumstances; and (d) CCI would have suffered precisely the same decline in the market value of its Piper shares had it obtained the control it allegedly was unfairly denied.

Second, the court of appeals decided that it would itself determine damages without a remand, and did so on the basis of selected portions of the testimony and report of a CCI expert who was not credited by the trial judge. The court made plain errors in calculating both the cost and the selling price and directed that judgment be entered against all defendants, jointly and severally, for $25,793,365. (B-21-32) It then merely "affirmed" the district court's decision to award prejudgment interest; but because of the redetermination of damages, this "affirmance" increased the actual interest award from $599,011 to approximately $10 million.

The result is a crushing $36 million judgment that provides a massive "windfall" (A-145) for the loser in the takeover contest, unfairly penalizes BPC and its directors for technical good faith violations, and renders the Williams Act a lethal weapon to deter competition for corporate control—a result Congress took "extreme care" to avoid. *Rondeau* v. *Mosinee Paper Corp.*, 422 U.S. 49, 58-59 (1975).

SUMMARY OF ARGUMENT

The judgment against BPC and its directors was based on two alleged violations. The first was a "technical" (A-149) violation of SEC Rule 10b-6 that the district court found not to have "such substance as to merit serious consideration . . . as a basis for money damages." (A-150) The second was an omission from BPC's exchange offer prospectus that the district court found to involve no "intent to mislead" (A-143) or "bad faith" (D-14) and to have no "causal relation" to the injury CCI claimed to have suffered. (A-144)

CCI neither bought nor sold the BPC securities involved in the alleged violation of Rule 10b-6. As for the alleged Section 14(e) violation, CCI was not the target of BPC's exchange offer, was not misled by the prospectus, and is not suing as a member of the shareholder class that Section 14(e) was intended to protect or for harm that Section 14(e) was intended to redress. CCI's only claim is that the two violations during BPC's quest for Piper stock injured CCI because CCI was seeking Piper stock at the same time. CCI did not, however, prove that BPC's violations caused it to lose its quest for control. CCI "withdrew from the struggle" while control was still available to either aspirant in the marketplace. (A-18, A-114-16, C-47) CCI suffered a loss on the Piper shares, just as BPC did, because both bought just before a sharp decline in the stock market and particularly in the share prices of general aviation companies including Piper.

The court of appeals bailed CCI out. Invoking a policy of "vigorous enforcement through private litigation" (A-22), it created damage actions in favor of a plaintiff the statute was not designed to protect; defined "scienter"

to include mere knowledge of an omitted fact, even in good faith; conclusively presumed that BPC's exchange offer would not "have attracted any takers" (A-60) without the omission; and further presumed, in the face of contrary findings of fact, that the two violations were what cost CCI its opportunity for control of Piper. Then, ignoring the statutory limitation to "actual damages on account of the act complained of," 15 U.S.C. § 78bb(a) (1970), the court of appeals awarded CCI an amount fifteen times as great as the value of the "opportunity" the court of appeals presumed it had lost.

1. The Implied Causes of Action

The court of appeals interpreted the federal securities laws so as to create two new implied federal causes of action for damages in favor of CCI. One was implied under Section 10(b) and Rule 10b-6 even though CCI was neither a purchaser nor a seller of the securities involved. *Compare Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723 (1975). The other was implied under Section 14(e) even though CCI was not a member of the class for whose "especial benefit" Section 14(e) was enacted, *compare Cort* v. *Ash*, 422 U.S. 66 (1975), and did not suffer the type of harm Section 14(e) was designed to redress. *Compare Rondeau* v. *Mosinee Paper Corp.*, 422 U.S. 49, 60 (1975).

a. *Section 10(b) and Rule 10b-6*

The court of appeals ruled that BPC had violated Section 10(b) and Rule 10b-6 in connection with a distribution of BPC securities. It then created an implied federal cause of action in favor of CCI for damages even though CCI neither bought nor sold the BPC securities in connection with which the violation occurred. This

ruling is inconsistent with the subsequent holding of this Court in *Blue Chip Stamps* that the plaintiff must purchase or sell the securities involved in order to have an implied cause of action for damages under Section 10(b). *Blue Chip Stamps* involved Rule 10b-5 rather than Rule 10b-6, but this Court's decision was based on the words "in connection with the purchase or sale" in Section 10(b) itself, words that necessarily limit the scope of both rules.

Subject to many exemptions, Rule 10b-6 prohibits a corporation that is engaged in a distribution of its securities from simultaneously buying the same securities or "rights" to buy such securities. Its objective is to protect purchasers of the securities in distribution from paying a price that has been artificially inflated by the issuer's own trading. *Weitzen* v. *Kearns*, 271 F. Supp. 616, 623 (S.D.N.Y. 1967). BPC was held to have violated the rule when, after announcing its intention to offer to exchange BPC securities for Piper stock, it purchased Piper stock for cash. Because of BPC's own exchange offer, the Piper stock itself was deemed to constitute "rights" to acquire the BPC securities.*

This case illustrates why *Blue Chip Stamps* was correct. CCI never bought or sold the BPC securities whose "distribution" Rule 10b-6 was designed to regulate. There is no proof that BPC's purchases affected the price

* This new and strained reading of Rule 10b-6 was hotly disputed. The main point was that BPC's purchases here were consistent with its announced intention to acquire as much Piper stock as possible, not (as in the normal case) directly contrary to an announced intention to sell. See the dissenting opinion of Chief Judge Lumbard at C-28-31. The only plausible market effect of buying Piper shares would be to raise the price of Piper stock. BPC obviously did not want to do that since it would make BPC's exchange offer seem less attractive. (C-45) In any event BPC's purchases were found not to have had any market effect. (A-151)

at which any security was purchased or sold by CCI. CCI's only claim is that it also wanted Piper stock. *Blue Chip Stamps* plainly and properly forbids making the purchaser of a security in a technically unlawful transaction liable to a plaintiff whose only claim is that it was seeking securities of the same class.

b. *Section 14(e)*

The court of appeals created for CCI, a takeover aspirant, an implied right to seek damages under Section 14(e), which was enacted to protect target company shareholders. This ruling, wrong in principle, has the practical effect of penalizing the very people Congress wanted to protect—the Piper shareholders who accepted BPC's exchange offer and now hold BPC securities.

Federal courts have sometimes created new implied damage remedies under federal statutes, but only "[b]ecause the interest of the plaintiffs in those cases fell within the class that the statute was intended to protect, and because the harm that had occurred was of the type that the statute was intended to forestall . . . ." *Wyandotte Transportation Co.* v. *United States*, 389 U.S. 191, 202 (1967). The statute must "create a federal right in favor of the plaintiff," *Cort* v. *Ash*, 422 U.S. 66, 78 (1975), who must allege "harm . . . redressable under its provisions." *Rondeau* v. *Mosinee Paper Corp.*, 422 U.S. 49, 60 (1975). These well established principles follow both from the general law of torts and from the inherent limitations on the federal courts.

Section 14(e) is a part of the Williams Act. That Act was designed to assure the shareholders of a target com-

pany accurate information with which to respond to an offer for their shares. Takeover aspirants, among others, were given the duty of obeying the disclosure requirements; there is no evidence that they were intended to be among the statute's beneficiaries. The words of the section itself contemplate only statements aimed at security holders. The committee reports on the Williams Act emphasized that it was a disclosure statute designed to provide material information to the target company shareholders; they say nothing about protecting offerors. Senator Williams, introducing the legislation, said that the law was "for the benefit of shareholders" and balanced that benefit against the burdens imposed on takeover aspirants. *See* p. 40, *infra.* The testimony at congressional hearings was that offerors "do not need any additional protection." *See* p. 42, *infra.* This Court in *Rondeau* recognized that "[t]he purpose of the Williams Act is to insure that public shareholders who are confronted by a cash tender offer for their stock will not be required to respond without adequate information . . . ." 422 U.S. at 58. Other courts have consistently taken this view. The fact that Section 14(e) protects target shareholders from misleading solicitations "in opposition to" a tender offer, if relevant at all here, reinforces this conclusion. Congress wanted shareholders to receive accurate information from both pro- and anti-takeover forces. There is no evidence whatever that Congress meant to protect (much less to provide a cause of action for damages to) the offeror, which can fend for itself.

CCI falls well outside the class "for whose especial benefit the statute was enacted." *Texas & Pacific Ry.* v. *Rigsby*, 241 U.S. 33, 39 (1916), quoted and reemphasized in *Cort*, 422 U.S. at 78. CCI is not a Piper share-

holder misled into tendering,* nor is it a Piper shareholder misled into not tendering, nor is it complaining of any injury done to Piper that might derivatively affect that company's shareholders. CCI sought damages solely on the ground that it, like BPC, was seeking Piper shares. An injury to this interest simply is not "redressable under its [the Williams Act's] provisions." *Rondeau*, 422 U.S. at 60. The fact that it might be redressable on a proper showing in state courts under state tort law does not alter this conclusion, as Judge Timbers thought (A-30); it reinforces it. *Cort*, 422 U.S. at 84-85.

So-called "standing" cases that involve only injunctive relief are not relevant here. Injunctions requiring the defendant to carry out a policy established by Congress can be afforded broadly even to those whose interests Congress did not specifically intend to protect, because "the fact is that one injunction is as effective as 100 and, concomitantly, that 100 injunctions are no more effective than one." *Hawaii* v. *Standard Oil Co.*, 405 U.S. 251, 261 (1972). Damages by contrast can have a multiplicative effect, often on innocent shareholders or even (as here) on the very shareholders (those who exchanged Piper shares for BPC securities) intended to be the beneficiaries. Accordingly, if a particular injury is to be compensable in damages, the federal courts "should insist upon a clear expression of a congressional purpose to make it so." *Id.* at 264. The only "clear expression"

* The Piper shareholders who were the intended beneficiaries of Section 14(e) have received the full measure of its protection. Because the BPC prospectus was found "unintentionally in error," the district court in the SEC action ordered BPC to offer rescission to the tendering shareholders, and BPC did so. None accepted. The present case concerns whether, in addition, BPC owes massive damages to CCI, the competing offeror.

from the language, history and purpose of the Williams Act is that target company shareholders, not tender offerors, were the intended beneficiaries.

2. Scienter

In *Ernst & Ernst* v. *Hochfelder*, 96 S. Ct. 1375 (1976), this Court held that a cause of action for damages will not lie under Section 10(b) and Rule 10b-5 in the absence of scienter, defined as "intent to deceive, manipulate, or defraud." *Id.* at 1381. The Court left undecided whether reckless behavior could ever be deemed "a form of intentional conduct." *Id.* at 1381 n.12. BPC's conduct in the present case does not meet the *Hochfelder* test.

The district court characterized the Rule 10b-6 violation as merely "technical" (A-149) and within the "intent" of one of the exemptions from the rule. (A-151) With respect to the BAR omission the district court found as follows:

> I find that Bangor Punta did not intentionally or purposefully mislead Piper Aircraft stockholders or the public or investors by the omission to make disclosure of the sale under consideration nor did Bangor Punta or its directors intend to gain an advantage over Chris-Craft by the nondisclosure in the contest being waged for control of Piper. There was no purposeful connection between the nondisclosure and the contest for control. In other words, the nondisclosure was not prompted by an improper purpose. However, absence of bad faith does not excuse the failure to state facts necessary to make the facts stated not misleading. (D-14)

The court of appeals expressly accepted the district court's findings. (A-47) But, using the term "scienter"

in a manner quite inconsistent with *Hochfelder*, the court of appeals ruled that mere knowledge of an omitted fact is enough. Judge Timbers said in the main opinion:

> In sum, and put as simply as possible, the standard for determining liability under § 14(e) on the part of a person making a misleading tender offer, or a responsible officer of a corporation making such . . . an offer, is whether plaintiff has established that defendant either (1) knew the material facts that were misstated or omitted, or (2) failed or refused to ascertain such facts when they were available to him or could have been discovered by him with reasonable effort. (A-36-37)

Judge Mansfield said almost the same thing. He thought only "*some degree of awareness*" was necessary. (A-105, emphasis in original) Without discussion, the court of appeals apparently applied the same test to the Rule 10b-6 violation. If scienter is satisfied by mere awareness, without more, then the scienter requirement in effect would be abolished.

BPC's conduct obviously satisfied the "awareness" test. BPC knew it was buying Piper stock for cash in May 1969, although it "did not then know of any rule or interpretation precluding the transactions," (C-22, Lumbard, C. J., dissenting) and, far from intending to deceive anyone, it fully disclosed them publicly and in a Schedule 13D filed with the SEC at the time they were made. BPC discussed disclosure of the BAR offer with its counsel and its financial advisors and concluded that disclosure would be premature. If BPC's judgments are now deemed wrong, it nevertheless plainly did not have the "intent to defraud, manipulate, or deceive" required by *Hochfelder*. Recklessness was neither charged nor

found and is precluded by the findings that were made. In any event, recklessness is insufficient to support the imposition of liability unless it amounts to intentional fraud.

The same standard of scienter should apply in private actions under Rule 10b-6 or Section 14(e) as in those under Section 10(b) and Rule 10b-5. With regard to Rule 10b-6, the statute underlying that rule is the same as the one underlying Rule 10b-5, so *Hochfelder* plainly controls. Section 14(e) is worded slightly differently, and incorporates language from Rule 10b-5(2) not found in Section 10(b) itself. While this Court noted in *Hochfelder* that these words taken by themselves do not explicitly resolve the scienter question, any doubt left by the language of Section 14(e) is resolved by its history. Both Section 10(b) and Rule 10b-5 are antifraud provisions. Section 14(e) was based on these provisions. The court of appeals in this case thought it was applying "the principles developed under Rule 10b-5" (A-34) to determine what form of scienter, if any, should be required under Section 14(e). Every other court that has considered the issue has started from the same premise. There is no reason to assume that when Congress borrowed the language of Rule 10b-5 and went on to describe Section 14(e) in the committee reports as a "fraudulent transactions" section, Congress was operating under the mistaken impression that Rule 10b-5(2) actions did not require "intent to deceive, manipulate, or defraud." Indeed, *Hochfelder* precludes such an assumption. In adopting a lesser standard of scienter, the court of appeals failed to anticipate *Hochfelder* and disregarded the logic of the interrelated and interdependent express remedies provisions of the securities acts.

3. Reliance and Causation

The district court found that CCI had not established "a nexus between the violations it charges and the damages it claims to have suffered." (A-147) As to the Section 14(e) claim, it found "no proof that a single exchanging Piper shareholder would have refrained from the exchange *and* taken an offer for his shares from Chris-Craft instead of that from Bangor Punta." (A-145) As to the Rule 10b-6 claim, it found no basis for concluding that even absent BPC's cash purchases CCI would have gained control. (A-150)

The court of appeals agreed (A-55-56) but ruled that under *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375 (1970), and *Affiliated Ute Citizens* v. *United States*, 406 U.S. 128 (1972), and "to encourage the vigorous enforcement of the securities laws through shareholder suits" (A-57) it was required to make two critical presumptions on CCI's behalf: first, even assuming "BPC's offer was superior to that of CCI, taking into account the BAR loss" (A-60), that "BPC's exchange offer would not "have attracted any takers" (A-60) without the BAR omission; and, second, that BPC's missteps caused CCI to lose control of Piper (the injury for which it was compensated) even though it was not proved that CCI "would have obtained a controlling position in Piper" (A-56) under any circumstances.

These rulings are both an erroneous reading of this Court's holdings and bad law. In *Mills*, suit was brought by shareholders challenging a proxy solicitation by management from which a material fact was omitted. The Court ruled that there was a violation because the omission itself denied the shareholders "fair corporate suffrage." 396 U.S. at 381. They were entitled to a proper

proxy regardless of any showing of what they would have done. The Court specifically found "no justification" for any presumption as to how the shareholders would have voted absent the omission. *Id.* at 382 n. 5.

In the present case, the district court ordered BPC to offer rescission to every shareholder who exchanged. That order, which BPC followed, is the most that *Mills* can demand and the only remedy to which CCI would be entitled even if it had established standing and scienter. The court of appeals, however, invoked *Mills* for a further step that *Mills* never envisioned: it gave CCI, a third party, a rule of law conclusively establishing that BPC's offer would not in fact "have attracted any takers" if the negotiations had been disclosed. (A-60)

The court of appeals then took an even broader leap. It simply ignored the district court's (C-47) and its own (C-9) conclusion that CCI was "still in a position" to gain control of Piper and was not "at any real disadvantage" *after* all the events at issue and conclusively presumed that BPC's missteps had caused CCI's defeat. As Judge Mansfield noted, however, "it was BPC's cash purchases in the open market of 100,614 shares, as compared with CCI's capacity to buy only 29,200 shares, that won control for BPC." (A-116)* The result reached by the court of appeals is as if, in the *Mills* case, the Court had created an irrebuttable presumption that the merger *would* have been rejected and had awarded damages to a competing suitor seeking a different merger with the target.

In *Rondeau*, this Court noted that "*Mills* could not be plainer in holding that the questions of liability and re-

* These purchases, Item 10 on the Table, were wholly lawful.

lief are separate in private actions under the securities laws, and that the latter is to be determined according to traditional principles," 422 U.S. at 64. CCI obviously should not have been awarded damages based on the difference between winning and losing the contest "in the absence of evidence establishing a reasonable probability that its defeat and damage were connected with the claimed violations." (A-145)

4. Damages

Section 28(a) of the 1934 Act prohibits any plaintiff from recovering more than its "actual damages on account of the act complained of." Since the court of appeals in *Chris-Craft II* had defined the injury as BPC's alleged interference with CCI's opportunity to compete for control of Piper, the district court first found the value of control. This value was found after an extensive hearing to be $4.80 per share. The district court discounted this figure to $2.40 because what was taken was not control itself but a highly uncertain "opportunity" to gain control. (B-57-70)

In *Chris-Craft III*, the court of appeals ignored its previous definition of the injury and adopted an indemnification measure of damages that increased damages more than fifteen-fold to $37 per share. The new formula was

> . . . the difference between the price CCI paid for its Piper stock . . . and the price it could have obtained for it through a public offering after BPC unlawfully acquired control . . . . (B-31)

The court of appeals tried to force this new formula to serve as a measure of the actual decline in the value of

CCI's holdings caused by BPC's obtaining a majority. The results are, at best, tens of millions of dollars wide of the mark.

The court of appeals first found the per-share value of a bloc of Piper stock that carried with it the chance of gaining control to be $64, based on CCI's supposed cost, despite the district court's finding that even a control bloc was worth only $52.80 per share at the relevant date. The court of appeals then found the per-share value of a minority bloc to be $27 per share, based on an estimated selling price five months after BPC obtained a majority. The SEC pointed out that this—

> appears to compensate Chris-Craft for a loss caused by a post-injury decline in the market value of Piper stock of approximately $15 per share—a loss that Chris-Craft would have sustained even if [BPC] had not violated the securities laws and, indeed, even if Chris-Craft itself had succeeded in the contest for control . . . . *Brief for the United States as Amicus Curiae on Petitions for Certiorari* at 23 n.14.

In this manner the court of appeals reached the remarkable conclusion that the value of control was $37 per share ($64 minus $27) for a stock that the court thought was itself worth only $27 per share.

The court of appeals then assessed damages based on the full $37 per share, making no allowance at all for the fact that what CCI lost was, at the very most, an opportunity to compete for control against a vigorous opponent. Even the SEC has acknowledged that this risks "substantial overcompensation of the defeated contestant," which lost only its "expectancy." *Id.* at 22.

What the court of appeals really did, as the cases it cited show, was to use a rescission measure of damages even though CCI was neither induced to buy nor forced to sell. The effect was to make BPC insure CCI against CCI's own misjudgment of Piper's worth and against a steep market decline. This was plain error. In a contest for control where the "act complained of" is denial of the opportunity to gain control, the "actual damages" under Section 28(a) must be measured by the value of control, "discounted by the likelihood that the defeated contestant would have lost the control contest" anyway. *Id.*

5. Due Process

Even if the court of appeals' second damage formula were right, it was error for the court to calculate damages itself, on the basis of selected excerpts from a record made on the old theory, without giving the parties an opportunity to present evidence or argument on the new theory. Had BPC been given the chance, it could, for example, have offered proof challenging the critical but unanalyzed assumptions that CCI would have had to register its non-control bloc with the SEC and that this would have taken five months of steady market decline. Such matters became critical after *Chris-Craft III* because every one-dollar difference in the presumed cost or hypothetical sale price of a Piper share changes the total judgment against BPC and its directors by $1 million. This denial of BPC's fundamental rights was compounded by the court of appeals' "affirmance" of the award of prejudgment interest. Since the court of appeals had itself increased the underlying damages fifteen-fold, this "affirmance" enlarged the interest component alone from $600,000 to nearly $10 million.

ARGUMENT

I. There Is No Implied Private Federal Cause of Action for Damages, Under Either Rule 10b-6 or Section 14(e), in Favor of One Takeover Aspirant Against Another.

The court of appeals created two new implied federal causes of action for damages, one under Rule 10b-6 and one under Section 14(e), in favor of one takeover aspirant against another. In so doing, the court disregarded controlling statutory language, accorded standing * to a class of plaintiffs Congress never intended to benefit, and overrode important and carefully drafted limitations on the express civil damage remedies in the same body of federal laws.

This Court has, in cases that are controlling here, repeatedly ruled against this kind of automatic provision of implied federal remedies. *See Cort* v. *Ash*, 422 U.S. 66 (1975); *Rondeau* v. *Mosinee Paper Corp.*, 422 U.S. 49 (1975); *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723 (1975); *Securities Investor Protection Corp.* v. *Barbour*, 421 U.S. 412 (1975); *National Railroad Passenger Corp.* v. *National Association of Railroad Passengers*, 414 U.S. 453 (1974); *cf. Hawaii* v. *Standard Oil Co.*, 405 U.S. 251 (1972). The Court has, instead, demanded a careful examination of the language, his-

---

* This case does not present an issue of "standing" in the constitutional sense. *Compare Simon* v. *Eastern Ky. Welfare Rights Organization*, 44 U.S.L.W. 4724 (U.S. June 1, 1976); *Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U.S. 150 (1970); *Flast* v. *Cohen*, 392 U.S. 83 (1968); *Baker* v. *Carr*, 369 U.S. 186 (1962). The question is not whether CCI has a sufficient interest in the injury it alleges but whether Congress intended to create a private federal damage remedy, under Section 10(b) or Section 14(e) of the 1934 Act, for the kind of injury CCI alleges it suffered.

tory, and purpose of a statute before concluding that particular harm is "redressable under its provisions" in an implied private action in a federal court. *Rondeau,* 422 U.S. at 60. That examination leads to a reversal here.

A. *CCI Has No Cause of Action for Damages Under Section 10(b) and Rule 10b-6 Because It Neither Purchased Nor Sold the Securities in Question.*

Rule 10b-6 was promulgated pursuant to Section 10(b) of the 1934 Act. SEC Release No. 34-5194 (July 5, 1955). In *Blue Chip Stamps,* this Court upheld the Second Circuit's *Birnbaum* * rule that a private cause of action for damages under Section 10(b) lies only in favor of a plaintiff who has purchased or sold the securities in question. CCI neither purchased nor sold the BPC securities in connection with which the alleged violation of Rule 10b-6 occurred. Consequently, CCI cannot sue BPC for damages under Rule 10b-6.

The court of appeals did not have the guidance of *Blue Chip Stamps.* It purported to distinguish *Birnbaum,* which involved Rule 10b-5, on the ground that "Rule 10b-6 does not contain the clause 'in connection with the purchase or sale of any security', which limits a cause of action under Rule 10b-5." (A-65 n. 29) The distinction is groundless. The "in connection with" language, which is the basis for the decisions in both *Blue Chip Stamps* and *Birnbaum,* comes from Section 10(b) itself, and it does not matter that the SEC chose to repeat the limiting clause in one rule under Section 10(b) but not in the other. Section 10(b) limits the reach of all

---

* *Birnbaum* v. *Newport Steel Corp.,* 193 F.2d 461 (2d Cir.), *cert. denied,* 343 U.S. 956 (1952).

rules issued under it. As this Court declared in *Ernst & Ernst* v. *Hochfelder*, 96 S. Ct. 1375, 1391 (1976):

> The rulemaking power granted to an administrative agency charged with the administration of a federal statute is not the power to make law. Rather, it is " 'the power to adopt regulations to carry into effect the will of Congress as expressed by the statute.' " [Citations omitted.] Thus, despite the broad view of the Rule [10b-5] advanced by the [Securities and Exchange] Commission in this case, its scope cannot exceed the power granted the Commission by Congress under § 10(b).

See also Miller v. *United States*, 294 U.S. 435 (1935). Were the law otherwise, as the court of appeals here thought, the SEC itself could overrule *Blue Chip Stamps* and the will of Congress by amending Rule 10b-5 to omit the statutory "in connection with" limitation that the rule now contains.

This case is a good illustration of why the decision in *Blue Chip Stamps* was right. Rule 10b-6 prohibits a corporation engaged in a distribution of its securities from simultaneously acquiring either those securities or "rights" to acquire them. The purpose of the rule is "to protect a purchaser of a security in a distribution from abnormal market pressures on the distribution price created by the issuer's or underwriter's own trading." *Weitzen* v. *Kearns*, 271 F. Supp. 616, 623 (S.D.N.Y. 1967); *see also SEC* v. *Scott Taylor & Co.*, 183 F. Supp. 904, 907 (S.D.N.Y. 1959). The securities in "distribution" here were BPC securities. BPC's acquisition of Piper stock was wrongful, if at all, only because it might in theory affect the price of the BPC securities in distri-

bution.* Anyone who purchased these BPC securities is a member of the "especial" class, *Cort* v. *Ash*, 422 U.S. at 78, that was intended to be protected by Rule 10b-6 and can meet the *Blue Chip Stamps* test. CCI was not a purchaser of BPC securities. It did not suffer any injury Rule 10b-6 was intended to prevent.

CCI's injury, if any, has nothing to do with the reason for Rule 10b-6. Its only claim is that it also wanted Piper stock.** CCI would, of course, have suffered exactly the same "injury" if BPC's purchases had been made ten to fifteen days earlier or two months later (either of which would have been possible) when the technical proscriptions of Rule 10b-6 would not have been applicable on any theory. *Birnbaum* and *Blue Chip Stamps* plainly forbid making the purchaser of a security in a technically unlawful transaction liable to a plaintiff whose only claim is that it was seeking the same security.

Obviously recognizing that the court of appeals ruling cannot survive *Blue Chip Stamps*, CCI argued in its opposition to certiorari that Rule 10b-6 might be read to define a "manipulative act" under Section 14(e) of the 1934 Act, which does not contain the words "in connection with the purchase or sale . . . ." This argument is as unpersuasive as it is untimely: BPC's "technical"

---

* In fact, the district court found that these private, off-exchange acquisitions did not "produce or heighten a stimulating effect on the market." (A-152)

** There was no proof that BPC's purchases affected the price at which any security was purchased or sold by CCI. (A-33) Judge Mansfield (A-111) and Judge Gurfein (A-96) both based CCI's standing solely on the ground that BPC's purchases added to BPC's holdings of Piper stock, rejecting Judge Timbers' speculation (A-65-66) that CCI might show some sort of injury to itself based on a legally presumed (but undemonstrated) market effect of BPC's purchases.

(A-149) violation of Rule 10b-6 did not contravene Section 14(e) either in theory or in fact.

Rule 10b-6 was issued for the carefully limited purpose, stated in the rule itself, of implementing terms "as used in Section 10(b) of the Act." The violations defined by Rule 10b-6 are, in light of its source in Section 10(b), necessarily subject to the statutory purchaser-seller limitation, and CCI's express purpose in asking this Court to reissue the rule under a different section is to change its meaning to remove this inherent limitation.* There is no reason for this Court to engage in such mysterious alchemy. The larger question, whether a rule like 10b-6, which is aimed at market manipulations by sellers, would be appropriate under Section 14(e), which is aimed at fraud by purchasers, is hardly an issue that should receive its initial consideration on certiorari. No lower court ever considered the possibility that BPC's cash purchases of Piper stock violated Section 14(e).

CCI's proposed carelessness with the language and statutory context of Rule 10b-6 is all the more inappropriate since there was no substance behind the technical violation. (A-149) BPC promptly disclosed its purchases of Piper stock. The district court specifically found that CCI was not misled (A-150), that there was "not a scintilla of evidence that any Piper holder was misled" (A-151), and that there was no evidence of any effect on the market for any security. (A-151-52) In the court of appeals, Judges Mansfield (A-111) and Gurfein (A-96) both expressly recognized the absence of any proof of a manipulative effect and predicated standing

* *Cf. SEC* v. *National Securities, Inc.*, 393 U.S. 453, 465-66 (1969) (rejecting the contention that an SEC rule defining "sale" for purposes of Section 11 of the 1933 Act could be invoked to define the same term as used in Section 10(b)).

on the technical violation. Since there was no manipulation in fact, it is hardly suprising that not even CCI has alleged, until now, that the purchases violated Section 14(e).

B. *CCI Has No Cause of Action for Damages Under Section 14(e) Because It Is Not a Member of the Class Congress Sought To Protect and Did Not Suffer the Injury Congress Sought To Prevent.*

The Williams Act of 1968, which added Section 14(e) to the 1934 Act, is a disclosure statute. As Senator Williams declared in introducing the bill:

> This legislation will close a significant gap in investor protection under the Federal securities laws by requiring the disclosure of pertinent information to stockholders when persons seek to obtain control of a corporation by a cash tender offer or through open market or privately negotiated purchases of securities. 113 Cong. Rec. 854 (1967). *See also* S. Rep. No. 550, 90th Cong., 1st Sess. 2-3 (1967); H.R. Rep. No. 1711, 90th Cong., 2d Sess. 3-4 (1968).

To give "stockholders" adequate information to make an investment decision, the Act imposed new filing requirements (Sections 13(d) and 14(d)) plus a traditional prohibition against fraud (Section 14(e)). While it is not clear that Congress intended to create any new damage remedy at all, it is very clear that any such remedy should be limited to the stockholders Congress sought to protect, not extended at their expense to other persons who are seeking their shares.

To begin with, neither the Act nor the committee reports or statements of the sponsors contain any reference

to any new private federal damage remedy.* If there is any such remedy at all, there is no reason to think it extends to suits against persons who have made registered exchange offers, such as that made by BPC. The gap that Congress perceived in the regulatory pattern was that *cash* tender offerors had no affirmative disclosure obligations to the shareholders whose stock they were seeking. *E.g.*, S. Rep. No. 550, 90th Cong., 1st Sess. 1-3 (1967). As to registered exchange offers, adequate damage remedies were already available in appropriate cases under Sections 11 and 12(2) of the 1933 Act.**

If a federal court is nevertheless going to imply a new cause of action for damages under Section 14(e) against the maker of a registered exchange offer, it must at least find implicit congressional intent to provide redress for the kind of harm the plaintiff is alleging. Such a finding is required by both the general law of torts and the inherent limitations imposed by the federal system, and this Court has repeatedly insisted on it for both reasons.

The doctrine that the federal courts can imply damage actions from federal statutes originated during the reign of *Swift* v. *Tyson*, 41 U.S. (16 Pet.) 1 (1842). It was based on the common law tort principle that the violation of a statute makes the actor liable to another person if

* Nor is there any reference to *J.I. Case Co.* v. *Borak*, 377 U.S. 426 (1964), *Kardon* v. *National Gypsum Co.*, 69 F. Supp. 512 (E.D. Pa. 1946), or any other case recognizing an implied damage action under the federal securities laws.

** CCI cannot qualify as a plaintiff or prove a cause of action under Section 11 or Section 12(2), although it has been awarded damages in excess of the amounts available under those sections. If Congress enacted Section 14(e) in order to circumvent the express limitations of those sections, it gave no indication of its intentions. *Cf. Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 736 (1975).

the intent of the statute was to protect that person from the particular harm caused. *See Restatement of Torts* § 286 (1934).* Accordingly, in *Texas & Pacific Ry.* v. *Rigsby*, 241 U.S. 33, 39 (1916), the Court ruled that a railroad switchman could recover from his employer for injuries resulting from a violation of federal railroad safety legislation because the employee was "one of the class for whose especial benefit the statute was enacted." This doctrine was first applied to the federal securities laws in the two-page opinion in *Kardon* v. *National Gypsum Co.*, 69 F. Supp. 512 (E.D. Pa. 1946). The district court in *Kardon*, relying on *Rigsby*, the *Restatement of Torts*, and "fundamental" law, *id.* at 514, ruled that shareholders who were induced to sell their stock by "fraudulent misrepresentations" could recover under Section 10(b) and Rule 10b-5 because they were members of the class for whose special benefit the section was enacted and had suffered the type of injury it was intended to prevent.

Since *Erie R.R.* v. *Tompkins*, 304 U.S. 64 (1938), which was not referred to in *Kardon*, this Court has consistently recognized that limiting implied federal damage remedies to the persons Congress sought to protect and the type of injury Congress sought to prevent is required not only by general tort law but also by fundamental restrictions on the power of the federal courts. In *Sola Electric Co.* v. *Jefferson Electric Co.*, 317 U.S. 173, 176 (1942), the Court ruled that a damage remedy, though implied rather than explicit, must be "derived from the

* The most recent formulation is that "in furtherance of the purpose of particular legislation" a court may "supply a civil action for damages affording relief to a person *for whose benefit* conduct of another was either proscribed or required by the legislation." *Restatement (Second) of Torts* § 874A (Tent. Draft No. 22, April 1976) (emphasis added).

statute and the federal policy which it has adopted." Quoting this language, the Court in *J. I. Case Co.* v. *Borak,* 377 U.S. 426 (1964), allowed stockholders a direct and derivative damage remedy for "[t]he injury which a stockholder suffers from corporate action pursuant to a deceptive proxy solicitation," *id.* at 432, the very injury the proxy requirements were designed to prevent. In *Wyandotte Transportation Co.* v. *United States,* 389 U.S. 191 (1967), a unanimous court stated the doctrine of *Rigsby* and *Borak* as follows:

> Because the interest of the plaintiffs in those cases fell within the class that the statute was intended to protect, *and* because the harm that had occurred was of the type that the statute was intended to forestall, we held that civil actions were proper. *Id.* at 202 (emphasis added).

Both parts of this formula have recently been reemphasized by the Court. Little more than a year ago, in *Cort* v. *Ash,* 422 U.S. 66, 78 (1975), Mr. Justice Brennan, speaking for a unanimous Court, re-endorsed the strict *Rigsby* test of whether implication of a private damage remedy in favor of a particular plaintiff is appropriate:

> First, is the plaintiff "one of the class for whose *especial* benefit the statute was enacted," *Texas & Pacific R. Co.* v. *Rigsby,* 241 U.S. 33, 39 (1916) (emphasis supplied)—that is, does the statute create a federal right in favor of the plaintiff?

In *Cort,* the plaintiff was denied standing as not sufficiently "especial" even though he was within the class of secondary beneficiaries explicitly named in the history of the legislation. *Id.* at 80-81. In *Rondeau* v. *Mosinee*

Paper Corp., 422 U.S. 49 (1975), decided the same day as *Cort*, the Court noted that mere membership in the special class is not enough to obtain a remedy: the plaintiff bringing an implied action under a federal statute must also allege a type of harm "redressable under its provisions." *Id.* at 60.

In short, the right to recover damages in a federal court is not merely a matter of providing redress for an injury perceived (or, in this case, presumed) by the court. The statute itself must "create a federal right in favor of the plaintiff." *Cort*, 422 U.S. at 78. If the statute is not explicit, this right may only be implied from a clear congressional intention to provide an "especial benefit" to a particular class of persons by protecting them against particular harm.*

That plain and sound doctrine precludes recovery by CCI here. The legislative history of the Williams Act makes it clear that the shareholders of the target corporation, not tender offerors or others who might indirectly be affected by the shareholders' misimpressions, were alone the intended beneficiaries of the statute. Senator Williams spoke directly to the point in introducing the bill:

> The purpose of this bill is to require full and fair disclosure *for the benefit of stockholders* while at the same time providing the offeror and management equal opportunity to fairly

---

* *See Mason* v. *Belieu*, No. 74-1731 (D.C. Cir., April 15, 1976) (although plaintiff's injury was "directly and foreseeably caused" by violation of Federal Aviation Act, she had no cause of action on ground that "someone *else* was denied transportation"); *Polansky* v. *Trans World Airlines, Inc.*, 523 F.2d 332 (3d Cir. 1975) (plaintiff was within the protected class, but did not allege a redressable harm, and was held not to have an implied cause of action).

present their case. 113 Cong. Rec. 854-55 (1967) (emphasis added).

The committee reports on the Williams Act are equally plain about the kind of harm the statute was intended to redress—harm to shareholders who need adequate information to make the decision whether to tender or hold:

> The public shareholder must, . . . with severely limited information, decide what course of action he should take. He has many alternatives.
>
> . . . .
>
> Without knowledge of who the bidder is and what he plans to do, the shareholder cannot reach an informed decision. He is forced to take a chance. For no matter what he does, he does it without adequate information to enable him to decide rationally what is the best possible course of action. This is precisely the kind of dilemma which our Federal securities laws are designed to prevent. S. Rep. No. 550, 90th Cong., 1st Sess. 2 (1967). *See also* H.R. Rep. No. 1711, 90th Cong., 2d Sess. 2-3 (1968).

The explanations of Section 14(e) in particular emphasized that Congress regarded tender offerors simply as persons upon whom obligations were imposed for the benefit of the shareholders:

> This provision would affirm the fact that persons engaged in making or opposing tender offers or otherwise seeking to influence the decision of investors or the outcome of the tender offer are under an obligation to make full disclosure of material information to those with whom they deal. S. Rep. No. 550, 90th Cong.,

1st Sess. 11 (1967); H.R. Rep. No. 1711, 90th Cong., 2d Sess. 11 (1968).

During the House hearings, the Chairman of the SEC testified:

> I would like to emphasize and reemphasize that the purpose of the bill . . . is a very simple one, solely to provide information to investors so that they can arrive at an informed investment decision. It is not designed to assist the offeror, nor designed to assist the management in resisting any plans put forward by the offeror. It is essentially based on the concept that the investor should have the information so that he can arrive at a decision. *Hearings on H.R.14475, S.510 Before the Subcomm. on Commerce and Finance of the House Comm. on Interstate and Foreign Commerce*, 90th Cong., 2d Sess. 17 (1968).

He told the Senate Committee:

> The investor is lost somewhere in the shuffle. This is our concern and our only concern. *Hearings on S.510 Before the Subcomm. on Securities of the Senate Comm. on Banking and Currency*, 90th Cong., 1st Sess. 178 (1967).

An important financial witness testified specifically that tender offerors required no protection:

> The two major protagonists—the bidder and the defending management—do not need any additional protection, in our opinion. They have the resources and the arsenal of moves and countermoves which can adequately protect their

> interests. Rather, the investor—who is the subject of these entreaties of both major protagonists—is the one who needs a more effective champion, and this is an important point. *Hearings on S. 510 Before Subcomm. on Securities of the Senate Comm. on Banking and Currency,* 90th Cong., 1st Sess. 57 (1967) (testimony of Professor Hayes).

In view of this history, it is hardly surprising that the courts have uniformly recognized protection of the target company's shareholders as the purpose of the Williams Act. In *Rondeau* v. *Mosinee Paper Corp.*, this Court declared:

> The purpose of the Williams Act is to insure that *public shareholders who are confronted by a cash tender offer for their stock* will not be required to respond without adequate information regarding the qualifications and intentions of the offering party. 422 U.S. at 58 (emphasis added).*

In *Klaus* v. *Hi-Shear Corp.*, 528 F.2d 225 (9th Cir. 1976), the Ninth Circuit denied a remedy to a deliberately defrauded tender offeror with the words "*the Williams Act was designed to protect cash tender offerees, not offerors.*" *Id.* at 232 (emphasis added). In *Sargent* v. *Genesco, Inc.*, 492 F.2d 750, 769 (5th Cir. 1974), the court declared:

---

* In rejecting the target company's claimed right to obtain an injunction to protect the interests of those of its shareholders who either sold at predisclosure prices or would not have invested had they known of the imminent takeover bid, the Court further declared: "[T]he principal object of the Williams Act is *to solve the dilemma of shareholders desiring to respond to a cash tender offer,* and it is not at all clear that the type of 'harm' identified by respondent is redressable under its provisions." 422 U.S. at 60 (emphasis added).

> The focus of the legislative history of section 14(e) is on adequate disclosure to those investors whose tenders are being solicited so that an informed meaningful consideration of the alternatives can be made.
>
> . . . .
>
> The evil to be remedied was inadequate disclosure to tendering security holders. Congress made it clear that the investor protection sought by 14(e) was disclosure to those who had to make the hold or sell decision.

Even Judge Timbers in *Chris-Craft II* acknowledged that "'[t]he legislative history of the 1968 amendment demonstrates that the focus of legislative interest was on the public shareholder; Congress wanted to ensure that he had the benefit of a full statement from the offeror, with a chance for "incumbent management" to "explain its position publicly," if so disposed . . . .'" (A-30-31, quoting *Electronic Specialty Co.* v. *International Controls Corp.*, 409 F.2d 937, 945 (2d Cir. 1969)) *Accord*, *Smallwood* v. *Pearl Brewing Co.*, 489 F.2d 579, 598 (5th Cir.), *cert. denied*, 419 U.S. 873 (1974); *H. K. Porter Co.* v. *Nicholson File Co.*, 482 F.2d 421, 423-24 (1st Cir. 1973).

CCI falls well outside the class for whose "especial" benefit Section 14(e) was enacted and has not alleged harm that Section 14(e) was intended to redress. Congress' stated concern was for persons in the position of the Piper shareholders who had to decide, based on BPC's prospectus, whether to tender their shares to BPC; the harm Congress intended to prevent, in a situation like the present one, was injury to those who did so. CCI is obviously not a member of that class. To be sure, by

regulating solicitations "in opposition to" as well as in favor of tender offers, Congress extended protection also to target shareholders who *fail* to tender because of a misleading opposition solicitation.* This is the class excluded by *Birnbaum* and *Blue Chip Stamps* from suing under Section 10(b). But CCI is not a shareholder misled into not tendering and so is not a member of this class either. In any event, BPC made no solicitation "in opposition to" any tender offer. Finally, even if the congressional intent to protect target shareholders were read so broadly as to permit nontendering shareholders, without proving that they made any investment decision at all, to recover from a tender offeror who has injured their company and hence their investments (*see Smallwood* v. *Pearl Brewing Co., supra*), CCI has no cause of action. No such injury to Piper is involved in this case.

CCI was awarded a massive judgment not because it was misled into tendering shares, nor because it was misled into not tendering shares, nor because there was any injury to Piper that affected the value of CCI's Piper investment. CCI sought and was given damages solely as a competitor for the same shares BPC obtained in its exchange offer. CCI is not in the special class, and it does not allege the particular harm with which Congress was concerned in the Williams Act.

---

* Section 14(e)'s prohibition of material omissions in "any solicitation of security holders in opposition to" a tender offer was intended to protect the target corporation's shareholders. *See* S. Rep. No. 550, 90th Cong., 1st Sess. 11 (1967). The concern of Congress was not to protect tender offerors but, "[i]n the rather common situation where existing management or third parties contest a tender offer," to protect the "shareholders [who] may be exposed to a bewildering variety of conflicting appeals and arguments designed to persuade them either to accept or to reject the tender offer." 113 Cong. Rec. 855-56 (1967) (remarks of Senator Williams).

The court of appeals' extension of standing beyond the statute's "target area" is especially unwarranted in light of its effect on the persons Congress was trying to protect. They, the Piper shareholders who exchanged their shares for BPC securities, were offered rescission; all declined. But if CCI's suit, based on what amounts to an allegation of tortious interference with its competing quest for their shares, is allowed to succeed, the tendering Piper shareholders (who now hold BPC securities) would be among the primary victims of CCI's recovery. *Cf. H. K. Porter Co.* v. *Nicholson File Co.*, 482 F.2d 421, 424-25 (1st Cir. 1973).*

The so-called "standing" cases that involve only injunctive relief are not pertinent here, except insofar as they demonstrate that a plaintiff may have standing to seek an injunction even though he himself has not suffered harm redressable in damages. That point was made in *Hawaii* v. *Standard Oil Co.*, 405 U.S. 251 (1972),

---

* The court of appeals misinterpreted (at A-32) Judge Friendly's general observation, in *Electronic Specialty Co.* v. *International Controls Corp.*, 409 F.2d 937 (2d Cir. 1969), that:

> In effect [Section 14(e)] applies Rule 10b-5 both to the offeror and to the opposition—very likely, *except perhaps for any bearing it may have on the issue of standing,* only a codification of existing law. *Id.* at 940-41 (emphasis added).

Under the *Birnbaum* rule a target shareholder who refrained from tendering his shares because of a misleading opposition statement could not sue under Section 10(b) because he was neither a purchaser nor a seller. The speculation that Section 14(e) might remove that obstacle offers no support for an extension of standing beyond the shareholders who were the intended beneficiaries. The holding of *Electronic Specialty* was simply that the target company had standing to seek injunctive relief. *See also Butler Aviation International, Inc.* v. *Comprehensive Designers, Inc.*, 425 F.2d 842 (2d Cir. 1970) (Friendly, J.). The case has no bearing on whether a person other than a shareholder has a right to obtain damages for injury to itself.

involving Sections 4 and 16 of the Clayton Act, which authorize private damage and injunction suits, respectively, for violation of the antitrust laws. This Court held in *Hawaii* that while a State may, along with many other plaintiffs, sue for injunctive relief against violations of the antitrust laws, it may not sue for damages to its general economy because that kind of injury is not compensable under Section 4 of the Clayton Act. *Id.* at 264. In reaching that conclusion, the court naturally recognized that every violation "is a blow to the free-enterprise system," *id.* at 262, that every damage award might be defended as serving some deterrent purpose, and that the harm alleged by Hawaii could be assumed to be real. Nevertheless, it said, if that "type of injury is to be compensable under the antitrust laws, we should insist upon a clear expression of a congressional purpose to make it so . . . ." *Id.* at 264. Standing to seek an injunction may be broadly afforded, said the Court, because "the fact is that one injunction is as effective as 100, and, concomitantly, that 100 injunctions are no more effective than one." *Id.* at 261. Separate but cumulative claims for damages are different, for they multiply the defendant's liability and may be duplicative. *Id.* at 261-62. Thus damages suits present, in a way that injunction actions do not, the question of how far Congress intended liability to extend.*

---

* The distinction between an injunction to enforce the policy of the law and damages to remedy a harm not contemplated by Congress is equally clear in the securities laws. *See, e.g., SEC* v. *Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 193 (1963); *Kahan* v. *Rosenstiel*, 424 F.2d 161, 173 (3d Cir.), *cert. denied sub nom. Glen Alden Corp.* v. *Kahan*, 398 U.S. 950 (1970); *Mutual Shares Corp.* v. *Genesco, Inc.*, 384 F.2d 540, 547 (2d Cir. 1967); *Neuman* v. *Electronic Specialty Co.*, [1969-1970 Transfer Binder] CCH Fed. Sec. L. Rep. ¶ 92,591 at 98,703-04 (N.D. Ill. 1969); *cf. General Time Corp.* v. *Talley Industries, Inc.*, 403 F.2d 159, 164 (2d Cir. 1968), *cert. denied*, 393 U.S. 1026 (1969).

Only two other arguments were suggested in the opinions below to support the implication of a cause of action on behalf of CCI, and both have already been rejected by this Court. Judge Mansfield said that CCI had "standing solely on the ground that vigorous enforcement of the anti-fraud provisions . . . calls for . . . implication of a private right of action in favor of a defeated contestant. . . ." (A-102-03) But standing "solely" on this ground was rejected in *Blue Chip Stamps*, 421 U.S. at 748-49. The unlimited invocation of the "vigorous enforcement" rationale would result, as here, in crushing judgments "'payable in the last analysis by innocent investors.'" *Id.* at 739, quoting *SEC* v. *Texas Gulf Sulphur Co.*, 401 F.2d 833, 867 (2d Cir. 1968) (Friendly, J., concurring). The target shareholders, the protected class, can provide a supplement to SEC enforcement actions and to the express causes of action Congress did create, if a supplement is deemed "necessary." *Rondeau*, 422 U.S. at 62.

Judge Timbers also argued that CCI "probably could state a claim for relief in most state courts against each of the defendants for tortious interference," and that he would "not infer from the silence of the statute that Congress intended to deny a federal remedy and to extinguish a liability which, under established principles of tort law, normally attends the doing of a proscribed act." (A-30) In *Cort*, this Court reached exactly the opposite conclusion: the existence of a traditional state-court remedy based on state law argues against, not for, implying a federal remedy from a federal statute designed to protect a different class of persons. 422 U.S. at 84-85; *cf. Blue Chip Stamps*, 421 U.S. at 738-39 n.9.*

---

* As noted by the American Law Institute, "There is a problem of broadening the jurisdiction of the federal courts if the court-

At bottom, the argument for CCI's right of action for damages is that if a nondisclosure to Piper shareholders did CCI an injury, even a conclusively presumed rather than a proved one, it must have a federal remedy. This is the more or less explicit rationale of the court of appeals. (A-30, 95) But as the Second Circuit recognized in *Iroquois Industries, Inc.* v. *Syracuse China Corp.*, 417 F.2d 963 (1969), *cert. denied*, 399 U.S. 909 (1970), in denying a damage remedy under Section 10(b) to a deliberately defrauded tender offeror, the fact that a plaintiff may have been hurt by the defendant's conduct "does not mean that a federal remedy must be furnished by judges. . . . If there is to be a federal remedy, it is the Congress which must create it." *Id.* at 969. The Second Circuit's later conclusion that Congress created such a remedy for CCI when it enacted Section 14(e) finds no support in the language, history, or purpose of the Williams Act.

II. The Actions of BPC and Its Directors Did Not Involve "Intent to Deceive, Manipulate, or Defraud" and Therefore Cannot Give Rise to Damage Liability Under Rule 10b-6 or Section 14(e).

In *Ernst & Ernst* v. *Hochfelder*, 96 S. Ct. 1375 (1976), this Court held that no private cause of action for damages will lie under Section 10(b) and Rule 10b-5 absent proof of "scienter"—defined as "a mental state embracing intent to deceive, manipulate, or defraud." *

---

granted remedy of a civil action for damages is treated as arising out of a federal statute. For this reason the federal courts may give particular attention to the question as to whether the state remedies are adequate." *Restatement (Second) of Torts* § 874(A), comment h at 79-80 (Tent. Draft No. 22, April 1976).

* The Court found it unnecessary to decide whether "recklessness" that is "a form of intentional conduct" could ever be sufficient to permit imposition of civil liability under Section 10(b). 96 S. Ct.

Id. at 1381 n. 12. Starting with the words of the statute itself, the Court noted that the terms " 'manipulative or deceptive' used in conjunction with 'device or contrivance' strongly suggest that § 10(b) was intended to proscribe knowing or intentional misconduct." *Id.* at 1383. The Court reviewed the legislative history of the 1934 Act and concluded that "[t]here is no indication that Congress intended anyone to be made liable for . . . [manipulative and deceptive] practices unless he acted other than in good faith." *Id.* at 1387. The Court's careful analysis of the express civil liability provisions of the federal securities laws, *id.* at 1387-89, confirmed that Section 10(b) creates liability only for intentional misconduct, and its examination of the history of Rule 10b-5 confirmed that the SEC had only "fraud" in mind when it adopted the language of the rule. *Id.* at 1390 n. 32.

BPC's actions did not involve "intent to deceive, manipulate, or defraud." To the contrary, the court of appeals approved the findings of the district court that BPC's two technical violations were committed in good faith without fraudulent intent. (A-37, 47, 97-98, 117-23, 142-44, 150; D-14; *cf.* C-28-31) Under these circum-

---

at 1381 n. 12. The Court did not attempt to define "recklessness" but plainly regarded it as conduct demonstrating a high level of culpability, since the plaintiff's charge in *Hochfelder* that the defendants acted with "inexcusable negligence" was insufficient to meet the test. *Id.* at 1380 n. 5. We submit that the rationale of *Hochfelder* precludes basing liability on recklessness, except in the limited evidentiary sense that sufficiently outrageous conduct can support a finding of "intent to deceive, manipulate, or defraud" despite a defendant's protests of good faith. But that issue need not be resolved here. The complaint did not charge BPC with recklessness in the Rule 10b-6 or Section 14(e) violations (F-1); CCI has always proceeded on a theory of intentional misconduct, *cf. Hochfelder*, 96 S. Ct. at 1391; and there was no finding (and no basis for a finding) of recklessness.

stances, the principles of *Hochfelder* preclude imposing liability on BPC. For while neither Rule 10b-6 nor Section 14(e) was involved in *Hochfelder*, there is no justification for applying a different standard of culpability in actions based on those provisions than in actions based on Rule 10b-5.

A. *The Actions of BPC and Its Directors Did Not Involve "Intent to Deceive, Manipulate, or Defraud."*

1. The Rule 10b-6 Violation.

Between May 14 and May 23, 1969, after announcing its intention to make an exchange offer for Piper shares but two months before beginning the exchange offer, BPC bought 120,200 Piper shares for cash in off-exchange transactions from three large investors. BPC's "intent" in making these purchases was simply to increase its holdings of Piper shares as part of its announced effort to gain control of Piper.

Far from intending to deceive anyone, BPC publicly disclosed these cash purchases immediately in its Schedule 13D filed with the SEC, again on May 29 in the preliminary prospectus for its exchange offer, and again in the final prospectus. Reports of the purchases appeared in the press. (App. 374A; EV 31, 1092) The district court found that CCI "was not misled" by these purchases (A-150) and that there was "not a scintilla of evidence that any Piper holder was misled." (A-151) Far from having "a mental state embracing intent to . . . defraud," 96 S. Ct. at 1381 n. 12, BPC was an "innocent party" that "did not then know of any rule or interpretation precluding the transactions" (C-22, 30, Lumbard C. J., dissenting) and was advised by its lawyers that the purchase

were lawful.* BPC had acted in a way that was "well within the spirit" of one of Rule 10b-6's several exemptions. (A-151) And far from intending to manipulate the price of any security, BPC's purchases "were not designed to produce a stimulating effect" (A-66), and did not "produce or heighten a stimulating effect on the market." (A-152)

In fact, BPC could not logically have intended the evil against which Rule 10b-6 is aimed. The rule prohibits a corporation that is engaged in distributing its securities from simultaneously purchasing the same securities or "rights" to the securities; its plain purpose is to prevent artificial stimulation of the market price of the securities being distributed. *Weitzen* v. *Kearns*, 271 F. Supp. 616, 623 (S.D.N.Y. 1967); *SEC* v. *Scott Taylor & Co.*, 183 F. Supp. 904, 907 (S.D.N.Y. 1959). CCI contended here that the Piper stock bought by BPC technically constituted "rights" to acquire BPC securities. The district court rejected this contention, pointing out that BPC's purchases would, if they had any market effect, "obviously serve only to make Bangor Punta's exchange offer appear less desirable to Piper shareholders" by raising the price of Piper stock. (C-45)

The court of appeals in *Chris-Craft I* reversed on the ground that the transactions in question fell within the

---

* It was the opinion of both BPC's in-house counsel and its outside counsel that Rule 10b-6 did not apply to purchases of Piper stock by BPC. Counsel advised that, taking "a conservative position," it would be "proper to buy shares of [Piper] but only if they were unsolicited and not over an exchange." (App. 1645A)

CCI had itself earlier purchased Piper shares on the open market following the announcement of its exchange offer, relying on an opinion of highly qualified counsel that Rule 10b-6 did not prohibit cash purchases of target company stock by an exchange offeror. (A-13; App. 401A)

literal terms of the rule and that cash purchases of a target company's stock might theoretically stimulate interest in the exchange offer.* (C-17-18) But the court of appeals had before it no evidence (and did not purport to make any finding) of any actual manipulative intention or effect of the purchases, and the district court on remand found no such intention or effect. (A-151-152) In short, as the district court found, there was no "substance in the 10b-6 contention behind the technical violation . . . ." (A-149)

In *Chris-Craft II*, each of the judges recognized that there was no proof that BPC's challenged cash purchases had a manipulative intent or effect. (A-63-67; A-96; A-111) Judge Timbers wanted to predicate liability on the extraordinary argument that since the court had previously held that the purchases were within Rule 10b-6, "then presumptively a stimulating effect was produced which misled the public." (A-66) Judge Mansfield, however, responded crisply that "[t]here was no such proof." (A-111) He and Judge Gurfein (A-96) explicitly predicated damages on the bare fact of the technical violation. They held, in short, that scienter in the *Hochfelder* sense was unnecessary in a private action under Rule 10b-6. This Court's subsequent decision shows that they were wrong.

---

* Even so, no one has ever explained why, as long as the purchases were correctly disclosed (as they were here), this is a "manipulation." Purchases by a corporation of the very securities it purports to be distributing (or the rights, like warrants, to buy those securities), will have an *artificial* upward impact on the market price of the securities being sold. This is the manipulation at which Rule 10b-6 is aimed. But purchases of a target company's stock (which are "rights" only because of the exchange offer itself) are entirely consistent with the offeror's announced and legitimate intentions.

What happened here is that a new and disputed interpretation of Rule 10b-6 was applied to BPC's purchases without the slightest proof that they had either a manipulative purpose or a manipulative effect. The court of appeals thus impermissibly substituted retroactive application * of a rule of manipulation for a finding that BPC's technical violation of Rule 10b-6 involved an "intent to deceive, manipulate, or defraud." **

2. The Section 14(e) Violation.

The district court found that BPC's exchange offer prospectus was "unintentionally in error" (A-143) in failing to disclose that the carrying (or book) value of BPC's interest in the Bangor and Aroostook Railroad ("BAR") was higher than the current market value

---

* On May 5, 1969, the SEC issued Release No. 34-8595 asking for public comment on *proposed* Rule 10b-13 prohibiting tender offerors from purchasing target company stock otherwise than pursuant to the tender offer. This rule did not become effective until November 10, 1969 and is not involved in this case. Although the SEC proclaimed in the release that this was merely "a codification of existing interpretations under Rule 10b-6," this assertion was rejected by all courts in this case. Indeed, the court of appeals itself noted that "neither the SEC nor the parties to this action have cited any such precedents, nor have we found any." (C-16; see also the district court's opinion at C-45).

** Nor is there any evidence or finding that BPC acted recklessly in making the cash purchases held to violate Rule 10b-6. CCI likes to pretend that the SEC warned both aspirants against making cash purchases and that CCI obeyed while BPC did not. In fact, for reasons never satisfactorily explained, the SEC staff personally advised CCI's chairman not to make the particular purchases at issue while "no such warning was ever communicated to Bangor Punta." (C-30 n. 4; *cf.* A-13, 15-16) Once again, no court has ever disputed Chief Judge Lumbard's characterization of BPC as an "innocent party" (C-30, n. 4) which "did not then know of any rule or interpretation precluding the transactions . . . ." (C-22) The SEC never charged BPC with a violation of Rule 10b-6 and never required it to disclose the supposed violation in any registration statement or other filing.

of that investment. The district court found that BPC had no "intent to mislead" (A-143) in making this mistake. Unfortunately for BPC, the SEC and CCI had originally accused it of a much more serious violation: deliberately deferring concluding an agreement to sell the BAR for less than its carrying value in order to avoid disclosing the loss in the exchange offer prospectus. (D-11-12) The district court found that accusation "unequivocally negate[d]" (D-11) by the credible evidence. Nonetheless, the accusation has continued to underlie the scienter arguments made by CCI. For that reason, it is necessary to make clear exactly what the violation actually found by the district court was.

On January 1, 1969, BPC owned a 98.7% stock interest in the BAR, which it had been considering disposing of for some time. The BAR investment was carried on BPC's books at $18.4 million on the basis of a 1965 appraisal.* Although the use of that figure as of that date was not challenged, the fact that it resulted from an appraisal rather than from a transaction is critical to what followed.

On April 1, 1969, BPC's Board appointed a committee to study a management plan to divest the BAR in whole or in part to BPC's shareholders, as well as other possibilities. (D-5; App. 1650A-51A) Several weeks later a member of the committee received an offer from Amoskeag Corporation to purchase the BAR stock for $5 million. (D-5) The committee reported to the Board on May 21, 1969. The proposal to sell the BAR stock "was

---

* The circumstances leading to the use of this figure (rather than BPC's shareholder's equity in the BAR of $29.8 million) were fully described in the financial statements contained in the exchange offer prospectus (EV 93, 99) and are set forth in the district court's opinion at D-3-4.

a surprise to the Board and met with the objection that the Board had insufficient information to make an intelligent decision since a great deal of accounting, tax and legal work had to be done to put the offer in proper focus." (D-7) The Board authorized further negotiations, seeking a higher price, subject to an investigation of tax and accounting consequences.* (A-44; D-5-8)

No understanding was reached with Amoskeag, however, and on June 3, 1969, BPC "table[d] the entire matter until the tax impact upon Bangor Punta of a sale of assets, as compared with some other disposition of the interest, could be studied and ascertained." (D-8, footnote omitted) The Board did not take the matter up again until September 9, 1969, when it authorized a sale of the BAR assets to Amoskeag, if possible, but if not, of the BAR stock. (A-44) Amoskeag only wanted the stock, and a sale of BPC's BAR stock to Amoskeag for $5 million in cash and contingent consideration was agreed to October 2, 1969, more than two months after BPC's exchange offer closed. The sale was announced the next day and the market price of BPC's stock reacted favorably. (D-9-13; App. 591).

On May 29, 1969, shortly after the May 21 Board meeting, BPC had filed a registration statement covering its exchange offer for Piper shares. The registration statement became effective on July 18, and the exchange offer continued until July 29. The prospectus carried the BAR investment at $18.4 million and did not mention the offer from Amoskeag. BPC, its directors, its in-house

---

* The district court, which heard the witnesses testify, found that BPC's representative "explicitly informed [Amoskeag] that time was needed for accountants and tax personnel of Bangor Punta to *review the tax effects of any deal and the evidence unquestionably confirms* [BPC's representative's] *limited exploratory role.*" (D-8, n.5) (emphasis in original)

counsel and its outside counsel were fully aware that an offer for the BAR had been received. First Boston and its counsel had read the minutes of the relevant Board meetings and had discussed the BAR matter with BPC counsel and executives. (A-48; App. 1657A-59A) Since there had been no decision to sell—indeed, the matter had been tabled—and since the financial effect of any disposition of the BAR would depend on the form of the transaction (which was still being studied),* no one suggested that disclosure of possible disposition was required. BPC's independent accountants were also fully aware of the negotiations concerning the BAR when they permitted the use of their opinion in the exchange offer prospectus. (D-6-13; App. 1759A-61A; EV 87, 89)

These facts wholly undermined the accusation that BPC decided "at some undefined time during June, July or August" (D-11) to sell the BAR to Amoskeag but had deferred the formalities to avoid writing down the investment during the exchange offer. The district court held that "the evidence which the Court accepts as worthy of belief unequivocally negates any such purpose or plan," (D-11) and that "[t]he Court has found that as of these dates [ending with August 27, 1969, the final date on which SEC rules required delivery of the prospectus] Bangor Punta had not reached a decision to sell." (D-13)

---

* For example, a sale of the assets might have resulted in the recognition of a large tax loss, which would have produced the benefit of additional cash flow for BPC. At one time it was thought that the cash flow might be as high as $17.5 million but after the extensive investigation required (which ended in September 1969) the cash flow advantage was estimated at about $9 million. (D-8-12; App. 2163A-66A) Sale of the stock might, it was recognized, result in capital gains tax; and this is what eventually did happen.

The district court did fault BPC, however, on a different theory: leaving the $18.4 million appraisal figure on its balance sheet without additional explanations. The court concluded that the $18.4 million figure was "obsolete" (D-14) in that it did not represent "the market value of the BAR holding." (D-13) BPC has, of course, never contended that in 1969 its directors believed the market value of the BAR to be $18.4 million. Their "unintentional" error was in applying to this special situation the normal rule that a balance sheet carrying value is only adjusted when there is a transaction or other definitive event establishing a new figure.*

The district court specifically found that BPC had no "propensity or natural inclination to violate the securities law" (D-17), that there was "no evidence of . . . bad faith" (D-16), no "intent to mislead" (A-134), and no "form of scienter." (A-144) Calling the BAR item a "mere negligent omission" (A-148), the district court went on to state its conclusions in full as follows:

> I find that Bangor Punta did not intentionally or purposefully mislead Piper Aircraft stockholders or the public or investors by the omission to make disclosure of the sale under consideration nor did Bangor Punta or its di-

---

* Judge Mansfield, concurring, pointed out that

> . . . under generally accepted accounting principles "stated book value" may properly be used in a financial statement and is not viewed in the financial world as the equivalent of market value. A person able to read a balance sheet would probably have recognized that such "historical" cost did not necessarily represent current liquidating value. Furthermore, to write down the figure immediately to $5 million might have been treated by the SEC as speculative and possibly misleading, in view of the other forms of disposition of BAR that were still under consideration. (A-122-123)

> rectors intend to gain an advantage over Chris-Craft by the nondisclosure in the contest being waged for control of Piper. There was no purposeful connection between the nondisclosure and the contest for control. In other words, the nondisclosure was not prompted by an improper purpose. However, absence of bad faith does not excuse the failure to state facts necessary to make the facts stated not misleading. (D-14)

The court of appeals accepted these findings. Judge Timbers in the main opinion said: "Our disagreement with the district court on whether defendants have violated § 14(e) does not go to its findings of fact, as to which the 'unless clearly erroneous' test applies, but to its application of the legal standards [of scienter] just discussed." (A-37) And later in his opinion he declared:

> The district court's findings of fact, supported by substantial evidence, do not warrant the conclusions that BPC's officers had decided to sell the BAR before the exchange offer became effective and had postponed consummation in order to avoid disclosure. *Nor does the evidence show that BPC failed to disclose the sales negotiations in bad faith.* As we have indicated above, however, *intent to defraud is not an indispensable element in a private action for damages under the antifraud provisions of the federal securities laws.* (A-47, emphasis added)

Judge Gurfein concurred. (A-97-98) Judge Mansfield concurred at some length, emphasizing that the findings of fact as to BPC's actions were "fully supported by more than ample credible evidence" (A-117), including findings as to "absence of bad faith or of an intent or purpose to violate the securities laws." (A-122)

The court of appeals reversed the district court and awarded damages to CCI, because, as Judge Timbers stated, it applied a different "legal standard" (A-37) of scienter:

> In sum, and put as simply as possible, the standard for determining liability under § 14(e) on the part of a person making a misleading tender offer, or a responsible officer of a corporation making such an offer, is whether plaintiff has established that defendant either (1) knew the material facts that were misstated or omitted, or (2) failed or refused to ascertain such facts when they were available to him or could have been discovered by him with reasonable effort. (A-36-37)

Judge Mansfield concurred, using almost exactly the same words. (A-106)

This standard requires only that the defendant have actual or imputed knowledge of the existence of any undisclosed fact later deemed by a court to have been material. As Judge Friendly pointed out in *Gerstle* v. *Gamble-Skogmo, Inc.*, 478 F.2d 1281, 1301 n.20 (2d Cir. 1973), it is a doctrine of "virtually absolute liability" where the defendant is a corporation because the corporation is "charged with the knowledge of all its agents." *

---

* In *White* v. *Abrams*, 495 F.2d 724, 732 (9th Cir. 1974), the court noted the inherent inconsistency in pronouncements on the scienter requirement in *Chris-Craft II*: "We have difficulty with the court's announced position that mere negligence is not sufficient for liability while in the same case it summarizes with language that sets forth a negligence standard . . . ." The Second Circuit later described the *Chris-Craft II* scienter test as permitting the imposition of liability upon a showing of "something short of specific intent to deceive," *Republic Technology Fund, Inc.* v. *Lionel Corp.*, 483 F.2d 540, 551 (2d Cir. 1973), *cert. denied*, 415 U.S. 918 (1974).

BPC was of course aware of the offer for the BAR. But that is not enough to satisfy the standard articulated in *Hochfelder*. There was, as the courts below repeatedly acknowledged, no intent to deceive, manipulate, or defraud.*

---

* Nor was there any finding (or the basis for any finding) of recklessness. Recklessness generally means acting with disregard of a known, actual risk of doing substantial injury to another person. *See Restatement (Second) of Torts*, § 500 (1965). Here, BPC had no reason to believe that nondisclosure of the BAR negotiations might injure Piper shareholders. BPC represented that it was offering securities "valued in the judgment of The First Boston Corporation at not less than $80 per Piper share," and the securities it offered *were* valued at that price by First Boston (A-140), which was fully aware of the preliminary negotiations for the sale of the BAR and whose opinion was unaffected thereby. No court has suggested that First Boston's opinion as to value was wrong; to the contrary, the district court found that "actual values reached by the Bangor Punta package were so close to $80 as to render any variance *de minimis*." (A-140) When the BAR sale did take place more than two months after the registration statement became effective, the price of BPC securities went up, not down. (App. 591A)

Judge Timbers once called the BAR omission a "flagrant" violation (A-84) and at another point used the term "reckless," (A-48) but his adjectives were rejected by Judge Mansfield. (A-122) And Judge Gurfein—writing for the court on the injunction issue—stated that even though "reckless conduct" is a proper basis for an SEC injunction, the district court's findings supported the denial of an injunction. (A-98-99) Finally, in his dissent from the denial of the general injunction the SEC had sought, Judge Timbers acknowledged again the district court's findings "that BPC did not *intentionally* or *purposefully* mislead and did not act in *bad faith*" (A-84, emphasis in original), while arguing that denial of the injunction "was clearly erroneous" (*id.*) under the proper legal standard.

B. *If There Is Any Cause of Action for Damages Under Rule 10b-6 or Section 14(e), It Does Not Lie in the Absence of Proof of "Intent to Deceive, Manipulate, or Defraud."*

There is no justification for permitting imposition of damage liability under Rule 10b-6 or Section 14(e) on a lower standard of culpability than that governing actions under Rule 10b-5.

1. Rule 10b-6.

This Court's holding in *Hochfelder* that Section 10(b) permits imposition of damage liability only upon proof of intent to deceive, manipulate, or defraud governs actions brought under Rule 10b-6 as well as those brought under Rule 10b-5. The decisive point, with respect to both rules, is that the SEC simply "cannot exceed the power granted [it] by Congress under § 10(b)." *Hochfelder*, 96 S. Ct. at 1391; *see Miller* v. *United States*, 294 U.S. 435, 439-40 (1935).

Requiring proof of deceptive or fraudulent intent as a prerequisite to recovery of damages under an anti-manipulation provision like Rule 10b-6 is also the right result, for, as this Court declared in construing Section 10(b) in *Hochfelder*:

> Use of the word "manipulative" is especially significant. It is and was virtually a term of art when used in connection with securities markets. *It connotes intentional or willful conduct designed to deceive or defraud investors by controlling or artificially affecting the price of securities.* 96 S. Ct. at 1384 (emphasis added; footnote omitted).

And, as the Court also noted in *Hochfelder*, since the provisions of the 1934 Act that deal more specifically

with artificial market-affecting practices require scienter, the sensible conclusion is "that Congress intended no lesser standard under § 10(b)." *Id.* at 1386.

Accordingly, there can be no recovery by a private plaintiff in an action based on Rule 10b-6 without proof of scienter.

2. Section 14(e).

The operative language of Section 14(e) is simply a restatement of paragraphs (2) and (3) of Rule 10b-5. Some of that language, when "[v]iewed in isolation . . . could be read as proscribing . . . any type of material misstatement or omission . . . whether the wrongdoing was intentional or not," *Hochfelder*, 96 S. Ct. at 1390. But no fair reading of Section 14(e) in its statutory context can support an inference of congressional intent to establish a standard of damage liability different from that applicable under Rule 10b-5.

This was the conclusion of the court of appeals, which created the Section 14(e) damage action. On the question of scienter, Judge Timbers declared that the court would "follow the principles developed under Rule 10b-5 regarding the elements of such [Section 14(e)] violations." (A-34) Similarly, Judge Mansfield recognized that "[n]o reason has been advanced for a different standard [of scienter] in the enforcement of § 14(e), the language of which is substantially the same as that found in § 10(b) and Rule 10b-5." (A-103) This basic ruling was correct; the court of appeals' error, as shown above, was using the wrong scienter test under Rule 10b-5.

Each of the other courts that has considered the question has also assumed or held that the same standards —including the scienter requirement—applicable under

Rule 10b-5 govern Section 14(e). For example, Judge Wisdom, writing for a unanimous court in *Smallwood* v. *Pearl Brewing Co.*, 489 F.2d 579, 605 (5th Cir.), *cert. denied*, 419 U.S. 873 (1974), declared: "Congress adopted in Section 14(e) the substantive language of the second paragraph of Rule 10b-5 and in so doing accepted the precedential baggage those words have carried over the years . . . . Once standing is established, therefore, the analysis under Section 14(e) and Rule 10b-5 is identical." On the specific problem of scienter he again emphasized "that the elements to be proved to establish a violation of Section 14(e) are identical to those under the Rule." *Id.* at 606. And Judge Friendly, commenting on the Section 14(e) scienter question in *Gerstle* v. *Gamble-Skogmo, Inc.*, 478 F.2d 1281, 1299 n. 17 (2d Cir. 1973), suggested that since "Congress in 1968 adopted the language of Rule 10b-5" in Section 14(e), the same scienter standards should apply. Two years ago, CCI told this Court the same thing: "Section 14(e) embodies the same principles, and indeed the same language as Rule 10b-5, which is the subject of a huge body of case law." *Respondent's Brief in Opposition to Certiorari, Piper* v. *Chris-Craft Industries, Inc.*, 414 U.S. 910 (1973).

The conclusion that Congress intended that the same scienter requirement govern private damage actions under Section 14(e) and Rule 10b-5 is plainly the right one. The language and legislative history of Section 10(b) indicate, as noted in *Hochfelder*, that Congress was contemplating only "intentional or willful conduct designed to deceive or defraud investors." 96 S. Ct. at 1384. The administrative history of Rule 10b-5 makes it "clear that when the Commission adopted the rule it was intended to apply only to activities that involved scienter." *Id.* at 1390. There is no reason to assume that

Congress in 1968 ignored that history and borrowed the language of Rule 10b-5 for use in Section 14(e) intending it to mean something different from what Congress meant when it enacted Section 10(b) and from what the SEC meant when it promulgated the rule. Indeed, *Hochfelder* itself precludes any such assumption.

The legislative history supports the scienter requirement. Both committee reports on the Williams Act described Section 14(e) as the section dealing with "fraudulent transactions." S. Rep. No. 550, 90th Cong., 1st Sess. 10-11 (1967); H.R. Rep. No. 1711, 90th Cong., 2d Sess. 11 (1968); *cf. Hochfelder*, 96 S. Ct. at 1385-386. And when Congress amended Section 14(e) in 1970, it authorized the SEC to issue rules to implement Section 14(e) and described these rules as relating to "fraudulent, deceptive, and manipulative" acts and practices. *See* S. Rep. No. 1125, 91st Cong., 2d Sess. 2, 4 (1970).*

There is also no logical reason why Congress should be deemed to have imposed a lower scienter standard under Section 14(e) than under Rule 10b-5. If any private damage remedy is available in this case, it is because Section 14(e) is read to extend such a remedy beyond the purchasers and sellers who alone have a remedy under Rule 10b-5. To suggest that the more remote additional plaintiffs brought in by such a reading of Section 14(e) should have a lower burden would overturn the logic of the interrelated and interdependent remedies provisions of the securities laws.

As this Court observed in *Hochfelder*, in every section of the securities laws that provides expressly for a dam-

---

* At the same time Congress described Section 14(e) as providing "investor protection against *fraudulent* activities in connection with these acquisitions [of control] and tender offers." S. Rep. No. 1125, 91st Cong., 2d Sess. 2 (1970) (emphasis added).

age remedy, Congress prescribed the required standard of culpability. 96 S. Ct. at 1388. Except for the short-term trading prohibition applicable to a very limited group, each such section "contains a state-of-mind condition requiring something more than negligence." *Id.* at 1388 n.28. When Congress did expressly permit liability to be imposed for less than willful misconduct, it carefully limited the defendant's potential exposure by defining the substance of the cause of action, the required relationship between the parties, the measure of damages, and the applicable procedural protections. *See* 1933 Act, §§ 11, 12(2), 15, 15 U.S.C. §§ 77k, 77*l*(2), 77o (1970); *cf. Hochfelder*, 96 S. Ct. at 1388-89. By contrast, where it did not limit the defendant's exposure to liability in all these ways, Congress required proof of willfulness. *See* 1934 Act, §§ 9, 18, 20, 15 U.S.C. §§ 78i, 78r, 78t (1970); *cf. Hochfelder*, 96 S. Ct. at 1388-89 n. 28.

In *Hochfelder* this Court emphasized the need to assure that any implied causes of action for damages are consistent with the pattern of express civil damage remedies. Since the implied actions do not contain the procedural restrictions the express ones do, retaining scienter as an element of implied private causes of action is appropriate:

> We think these procedural limitations indicate that the judicially created private damage remedy under § 10b—which has no comparable restrictions—cannot be extended, consistently with the intent of Congress, to actions premised on negligent wrongdoing. Such extension would allow causes of action covered by § 11, § 12(2), and § 15 to be brought instead under § 10(b) and thereby nullify the effectiveness of the carefully drawn procedural restrictions on these ex-

press actions. 96 S. Ct. 1389 (footnotes omitted).*

The present case illustrates the point perfectly. BPC's exchange offer was registered under the 1933 Act. For any material omission from the registration statement, BPC and its directors are liable to all purchasers under Section 11 and BPC is liable to direct purchasers under Section 12(2). CCI cannot recover under those sections because it was not a purchaser, did not rely on or buy or sell at a price affected by any misrepresentation, and sought damages vastly in excess of the statutory limits imposed by those sections, for an injury traceable to other causes. CCI seeks to avoid all these difficulties by suing under Section 14(e); but it invokes the same "mere awareness" standard of culpability that suffices under

---

* As noted in *Hochfelder*, 96 S. Ct. at 1388 n.28, the standard of culpability required to maintain a damage action under the proxy statement provision of the 1934 Act, Section 14(a), 15 U.S.C. § 78n(a) (1970), has not been established, but some lower courts have allowed damage actions against management "by the shareholder recipients of a materially misleading proxy statement" without scienter, because of the "important difference between the operative language and purpose of" the proxy provision as compared with Section 10(b). *See Gould* v. *American-Hawaiian Steamship Co.*, [Current] CCH Fed. Sec. L. Rep. ¶ 95,512 at 99,597 (3d Cir. 1976); *Gerstle* v. *Gamble-Skogmo, Inc.*, 478 F.2d 1281 (2d Cir. 1973).

The "operative language" of Section 14(a) prohibits solicitations of proxies "in contravention of such rules and regulations as the Commission may prescribe . . . ." It differs sharply from the "evil-sounding language," *Gerstle*, 478 F.2d at 1299, of Section 10(b) and Section 14(e). The word "fraud" is not used in the proxy provision or rules; in contrast, Congress explained Section 14(e) as a "fraudulent transactions" section. Section 14(a) is at the heart of management's obligation to make a periodic accounting to shareholders for its discharge of its quasi-fiduciary duty, which is why Judge Friendly concluded even before *Hochfelder* that permitting shareholders to sue for mere negligence under Section 14(a) is consistent with the fact that "scienter must be proved in a private action under Section 14(e)," *Gerstle*, 478 F.2d at 1299 n.17.

Section 12(2). Permitting it to do so would nullify carefully drawn substantive, as well as procedural, limitations.

III. The Court of Appeals Wrongly Interpreted This Court's Decisions in the *Mills* and *Ute* Cases To Create a Conclusive Presumption That BPC's Exchange Offer Would Not "Have Attracted Any Takers" Without the BAR Omission and Wrongly Assumed, in the Face of Contrary Findings by the District Court, That BPC's Acts Caused CCI To Lose the Control Contest.

Traditional principles of tort law require a plaintiff who seeks damages to show not only that the defendant violated a duty but also that the violation caused compensable injury. *See Restatement (Second) of Torts* §§ 9, 430 (1965); W. Prosser, *Law of Torts* § 41 (4th ed. 1971). This Court has consistently recognized that proof of causation of injury is essential before relief will be awarded under the securities laws. *E.g., J. I. Case Co.* v. *Borak*, 377 U.S. 426, 431 (1964); *Rondeau* v. *Mosinee Paper Corp.*, 422 U.S. 49, 62-65 (1975).

In the present case, this "causal nexus" between violation and injury has two elements. First, CCI could not have been injured by the BAR omission in the BPC exchange offer unless a significant number of tendering Piper shareholders relied on it in the sense that they would not have accepted BPC's exchange offer had they known of the possible sale of the BAR. Second, even if there was reliance in this sense, neither the BAR omission nor the Rule 10b-6 violation caused injury to CCI unless the outcome of the contest would have been different had the violations not occurred. Both these links needed to be proved.

The district court found, after trial, that CCI had failed to establish "a reasonable probability that its de-

feat and damage were connected with the claimed violations." (A-145) With respect to the possibility of reliance on the BAR omission, the district court said:

> There is no proof that a single exchanging Piper shareholder would have refrained from the exchange *and* taken an offer for his shares from Chris-Craft instead of that from Bangor Punta. (A-145)

With respect to the alleged Rule 10b-6 violation, the district court found "not a scintilla of evidence that any Piper holder was misled" (A-151) and no proof that it decided the contest:

> Even granting that the block purchases resulted arithmetically in Bangor Punta's achievement of control, there is no basis for concluding that, absent Bangor Punta's acquisition of these blocks, Chris-Craft would have achieved its goal of control. Thus the record will not support a contention that Bangor Punta should, by reason of violation of Rule 10b-6, compensate Chris-Craft for the latter's failure to gain control of Piper. (A-150)

The court of appeals did not even suggest that these findings were erroneous. Indeed, it was prepared to "assume arguendo that BPC's offer was superior to that of CCI, taking into account the BAR loss . . . ." (A-60) However, it then misread this Court's decision in *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375 (1970), and *Affiliated Ute Citizens* v. *United States*, 406 U.S. 128 (1972), to require that damages be awarded anyway.

The court made two fundamental errors. First, in connection with the BAR omission, the court thought that *Mills* and *Ute* required it to presume conclusively, on behalf of a third party, that every tendering Piper share-

holder would have rejected the BPC exchange offer had this "unintentional" error not been made. Second, the court of appeals disregarded the fact that even if there were a presumption of reliance by Piper shareholders, CCI still failed to show that this presumed reliance or the technical Rule 10b-6 violation caused it to lose the control contest, the injury for which it was compensated.

A. *There Was No Basis for a Conclusive Presumption That BPC's Exchange Offer Would Not "Have Attracted Any Takers" Without the BAR Omission.*

All other issues aside, CCI was not in fact injured by the BAR omission unless the Piper shareholders who accepted BPC's exchange offer relied on the omission in the sense that they "would have been influenced to act differently than [they] did act if [BPC] had disclosed to [them] the undisclosed fact." *List* v. *Fashion Park, Inc.*, 340 F.2d 457, 463 (2d Cir.), *cert. denied sub nom. List* v. *Lerner*, 382 U.S. 811 (1965); *see also Dopp* v. *Franklin Nat'l Bank*, 461 F.2d 873, 880 (2d Cir. 1972); *cf. Simon* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 482 F.2d 880, 884 (5th Cir. 1973). The district court found CCI had failed to prove reliance by the Piper shareholders. The court of appeals obligingly granted CCI a presumption that BPC's exchange offer would not "have attracted any takers" (A-60) had the possible sale of the BAR been mentioned. This was based on a misreading of *Mills*.

Mills was a suit by shareholders claiming that a proxy statement used by management to solicit their votes for a merger was misleading because it failed to disclose a relationship between management and the proposed merger partner. The court of appeals had ruled that even though this was a material omission it did not affect the

fairness of the merger, and the defendants should have judgment if the terms were fair in fact. This Court reversed and remanded on the ground that this procedure would "allow shareholders to be bypassed" in favor of "a judicial appraisal of the merger's merits." 396 U.S. at 381.

The Court did not create or endorse any presumption, conclusive or otherwise, about how the shareholders would have behaved had they been fully informed. On the contrary, it held that there was "no justification for . . . [the] presumption . . . implicit in the opinion of the Court of Appeals," that the shareholders would have voted for the merger if its terms were fair. 396 U.S. at 382 n. 5. But since the central purpose of Section 14(a) was "[f]air corporate suffrage," *id.* at 381, the Court held that the "[u]se of a solicitation that is materially misleading is itself a violation of law . . . ." *Id.* at 383. The shareholders were entitled to a proper proxy statement before their votes could be validly used, and speculation about how they would have voted was irrelevant. In short, reliance was not presumed; it was simply unnecessary to the conclusion that the shareholders had been wronged by the use of their proxies obtained by a deficient solicitation. *See Kohn* v. *American Metal Climax, Inc.*, 458 F.2d 255, 289 (3d Cir.) (Adams, J., concurring and dissenting), *cert. denied*, 409 U.S. 874 (1972).

The present case is altogether different. CCI is not a shareholder vindicating its absolute legal right to a proper proxy statement regardless of any showing of what it would in fact have done. The injury for which CCI was compensated does not even exist unless it is established, at a minimum, that BPC would not in fact have obtained, and that CCI would in fact have obtained, Piper shares

tendered to BPC in its exchange offer. CCI's case depended, logically, on proof that the BAR omission actually affected what a large number of the tendering Piper shareholders did. *Mills* is not a substitute for that proof.

If *Mills* has any application outside proxy cases, the district court here did full justice to *Mills* when it ordered BPC to offer rescission to the tendering Piper shareholders. They were the persons who were allegedly injured (although none of them ever brought suit) by a prospectus deficiency without which they "might have hesitated" (D-15) to tender their shares. The district court therefore ordered that the prospectus "be corrected for those to whom it related" (A-143), in accordance with Section 14(e)'s stated purpose of requiring offerors to make full disclosure "to those with whom they deal." S. Rep. No. 550, 90th Cong., 1st Sess. 11 (1967).

The court of appeals' presumption that the Piper shareholders would have rejected BPC's offer (which is the only basis on which the court could find injury to CCI, a third party) was not justified either by findings of fact or by *Mills*. The Court that decided *Mills* would have been astounded by the proposition that a competing suitor, seeking a different merger with the target company, could automatically recover damages by proving the omission and then invoking a conclusive "presumption" that the merger would have failed. Yet that is exactly analogous to what the court of appeals did here when it said on behalf of CCI:

> Under the *Mills-Ute* test we must presume that BPC's offer was not so appealing, considering the BAR loss, as to have attracted any takers . . . . (A-60)

The court of appeals mistakenly sought confirmation of its reading of *Mills* in this Court's decision in *Affiliated Ute Citizens* v. *United States*, 406 U.S. 128 (1972). That too, is a case in which reliance was not presumed but was logically unnecessary. Certain Indians brought suit against bankers who acted as custodians of shares of stock owned by the Indians. The bankers, who were "acting for the individual stockholders" and thus had fiduciary responsibilities to them, deliberately "devised a plan" that "operated as a fraud" on the Indians by "induc[ing]" them to dispose of their stock at less than its fair value. *Id.* at 152-53. This scheme cheated the Indians without regard to whether they relied on any particular misinformation.*

The key to the court of appeals' misapplication of *Mills* and *Ute* is the different status of CCI from the plaintiffs in those cases and the different nature of the injury for which CCI is seeking damages. This case is not concerned with vindicating the right to a prospectus: the Piper shareholders who exchanged their shares and now hold BPC securities are not the plaintiffs in this case but, in effect, defendants hoist by a presumption of their own reliance. CCI, a stranger to the transaction, seeks to recover damages on the ground that it was affected when *they* were misled into acting differently than they otherwise would have.** But a competing offeror like

* The Court did say that the bankers had violated Rule 10b-5(2) by understating at least one material fact—the prevailing market price of the shares. It is hardly necessary to "presume" whether a seller would have sold if he had known that a higher price was available in the market. In any event, carefully limiting its ruling to "the circumstances of this case," the Court made it clear that the decision turned not on the specific misstatement but the overall scheme, and that was why reliance was unnecessary. 406 U.S. at 153.

** The court of appeals relied on its own earlier decision in *Crane Co.* v. *Westinghouse Air Brake Co.*, 419 F.2d 787 (2d Cir. 1969),

CCI has shown no injury at all unless and until it establishes that a significant number of shareholders would have acted differently. Evidence of this is by no means impossible to obtain,* and should be required under this Court's direction in *Mills* that "damages should be recoverable only to the extent that they can be shown." 396 U.S. at 389.**

---

cert. denied, 400 U.S. 822 (1970), to support its conclusion that CCI could recover without proving that in fact a significant number of shareholders would have acted differently. Neither *Crane* nor the case it relied on, *Vine* v. *Beneficial Finance Co.*, 374 F.2d 627 (2d Cir.), *cert. denied*, 389 U.S. 970 (1967), creates a presumption of reliance by shareholders. Those cases merely permit a plaintiff who was not himself deceived to recover if a "deception which misled" others is "shown" and if "this was in fact the cause of plaintiff's claimed injury." *Vine*, 374 F.2d at 635, quoted in *Crane*, 419 F.2d at 797. *Vine* involved the sufficiency of the complaint, so the allegation of reliance by others was taken as true. *Crane*, as the district court here pointed out (A-146), involved a fact situation in which the target company shareholders were unquestionably misled into not tendering. The defendant there violated Section 9(a)(2) of the 1934 Act and Rule 10b-5 by deliberately engaging in offsetting transactions that artificially inflated the price of the target company's stock above the tender offer price on the crucial last day of Crane's tender offer. The court of appeals in *Chris-Craft II* simply ignored this crucial factual distinction.

* For example, to the extent that there are large institutional holdings, there is readily available direct evidence of whether significant blocs would have been tendered. *See also, e.g., Kohn* v. *American Metal Climax, Inc., supra*, 458 F.2d at 288 (Adams, J., concurring and dissenting); Cobine, *Elements of Liability and Actual Damages in Rule 10b-5 Actions*, 1972 U. Ill. L. Forum 651, 688-89.

** A showing of materiality alone does not provide the needed factual link because, as the concept was applied here, there is no good reason to think any Piper shareholders were influenced by the BAR omission at all. No exchanging shareholder either sued BPC or accepted the offer of rescission. The district court said that "[t]he standard of materiality to be applied here is whether a reasonable stockholder of Piper *might* have *hesitated* to make an exchange for Bangor Punta securities" had the BAR negotiations been fully disclosed. (D-15, emphasis added) The court of appeals affirmed. (A-45-46) While a finding that some shareholders "might

Even if *Mills* and *Ute* could be extended to give a third party a presumption about how someone else would have acted under other circumstances, nothing in those decisions justifies making the presumption conclusive, as the court of appeals did here. Even the policy of "vigorous enforcement" of the securities laws does not support damages for injury the defendant did not cause.* If problems of proof are thought to support a presumption as a starting place in appropriate cases, there is no excuse whatever for excluding contrary evidence. *See* Note, *The Reliance Requirement in Private Actions Under SEC Rule 10b-5*, 88 Harv. L. Rev. 584, 597-600 (1975). Other courts of appeals faced with the issue have permitted the defendant to prove the absence of reliance. *See Rochez Bros., Inc.* v. *Rhoades*, 491 F.2d 402, 410 (3d Cir. 1974); *Chelsea Assoc.* v. *Rapanos*, 527 F.2d 1266 (6th Cir. 1975); *Carras* v. *Burns*, 516 F.2d 251, 257 (4th Cir. 1975). But here, BPC was given no opportunity to rebut the court of appeals' presumption by showing that there were Piper stockholders who would have accepted the exchange offer had they known of the BAR offer. *Compare Blackie* v. *Barrack*, 524 F.2d 891, 906 (9th Cir. 1975), *petition for cert. filed*, 44 U.S.L.W. 3518 (U.S. Mar. 16, 1976). The court of appeals simply reversed the district court's finding that CCI failed to prove

---

have hesitated" to have exchanged with BPC may be enough to require that the fact be disclosed to the offerees and even that they be given the opportunity to rescind, *see Northway, Inc.* v. *TSC Industries, Inc.*, 512 F.2d 324 (7th Cir.), *cert. granted*, 423 U.S. 820 (1975), *argued*, March 3, 1976, it is hardly an adequate basis to support a presumption that BPC "obtained control through its violations of the securities laws." (A-56)

* Under Section 11 of the 1933 Act, 15 U.S.C. § 77k (1970), for example, a defendant can avoid liability by proving that the plaintiff could not have relied on the misstatement or omission because the plaintiff knew of it.

reliance by the Piper shareholders; it did not remand to give BPC a chance to show the absence of reliance. *See Herbst* v. *International Tel. & Tel. Corp.*, 495 F.2d 1308, 1316 n. 14 (2d Cir. 1974).

B. *There Was No Proof That BPC's Alleged Missteps Caused the Injury for Which CCI Was Compensated.*

The injury for which CCI was compensated was denial of control of Piper. The injury the court of appeals purported to find was denial of an opportunity to compete for control. To show that BPC's alleged missteps actually denied it control, or even the opportunity for control, CCI should have been required to establish that it had a reasonable prospect of gaining control absent the violations. In fact, even granting the court of appeals' presumption that without the BAR omission not a single Piper shareholder would have tendered to BPC in its exchange offer, such a presumption does not establish that the BAR omission (or the Rule 10b-6 violation) affected the outcome.

There was no proof that CCI would have won under any circumstances. The district court found, and the court of appeals agreed, "that CCI failed to show with reasonable certainty that it would have obtained a controlling position in Piper had it not been for the violations" alleged. (A-56) The court of appeals ignored the question of actual effect and relied solely on the truism that if 14% out of BPC's 51% were left out of account BPC would have less than 51%; it disregarded the fact that the shares would have remained available, that BPC had the resources and the will to buy them, and that CCI did not. As to the BAR omission, the court of appeals' entire analysis of causation was as follows:

> Since BPC eventually acquired only about 51% of the outstanding Piper shares, it is clear that the 7% acquired through its exchange offer was critical to its success. Reliance and causation have been shown. (A-60)*

The court of appeals took a similarly mathematical approach to the impact of the supposed Rule 10b-6 violation. (A-67, A-96, A-111)

This simplistic reasoning disregarded the fact that the control contest was not a race but an auction, won, as it should have been, by the higher bidder. CCI had virtually exhausted its cash and borrowing capacity by spending about $35 million by February 4. (A-113-15, 128) BPC, whose large initial acquisition from the Pipers three months later was made for securities, always had more cash, more borrowing power (see A-113-15) and, since disclosure of the BAR transaction had no negative effect on their value (App. 591), more valuable securities to offer. Each of CCI's tender offers (unlike BPC's) was for a limited number of shares; the first one, which was for far fewer shares than needed for control, brought CCI "more shares than it agreed to buy." (A-113) Once BPC entered the contest, it consistently outbid CCI. (A-140 n. 10) Finally, CCI "withdrew from the struggle" (A-18) before BPC had a majority.

In light of these facts, and others, the district court quite properly found no "causal relation between the deficiency [in the prospectus] and the harm complained of" (A-144), and "no basis for concluding that, absent

---

* The reason BPC got "only about 51%" is, of course, that it voluntarily stopped buying when it reached that figure in September. When BPC stopped buying, about 7% of Piper stock was in public hands. If BPC had gone on to buy these shares the exchange offer would not have been "critical to its success."

Bangor Punta's acquisition of these [Rule 10b-6] blocks, Chris-Craft would have achieved its goal of control." (A-150) CCI lost because it had " 'shot its bolt' in the financial sense by early February 1969" and "was in no position to purchase for cash any appreciable amount of Piper shares" thereafter. (A-114) (Mansfield, J., concurring)

CCI should have had the burden of proving that BPC's acts materially affected the outcome of the contest, *see Dasho* v. *Susquehanna Corp.*, 461 F.2d 11, 28-29 (7th Cir.), *cert. denied*, 408 U.S. 925 (1972); *cf. Lowenschuss* v. *Kane*, 520 F.2d 255, 269 (2d Cir. 1975), but in fact there were judicial findings at precisely the critical moment that the contest was still open. In August 1969, after both of BPC's alleged missteps, CCI sought a preliminary injunction restraining BPC from, *inter alia*, accepting the shares tendered in response to its exchange offer or buying additional Piper shares. The district court denied the injunction, expressly finding that the contest for control was then still open and both sides had a chance of victory. The court said:

> With approximately 259,026 shares of Piper still in the hands of the public, it would appear that at this time neither Chris-Craft nor Bangor Punta has succeeded in gaining control of Piper. (C-38)
>
> Neither party has gained control of Piper, and both are still in a position to do so. (C-47)

The court of appeals en banc affirmed the denial of a preliminary injunction, agreeing with the district court that the contest was still open:

> [W]e conclude that the district court did not err in refusing to enjoin the continued solicita-

> tion of stock by Bangor Punta. At that time Chris-Craft was free to compete equally with Bangor Punta for the remaining Piper shares, and it did so. We do not understand Chris-Craft to allege that prior misdeeds of Bangor Punta so determined the course of the competition for shares after the date of the decision below that Chris-Craft was placed at any real disadvantage. (C-9)

The court of appeals reaffirmed this conclusion in its later opinion on liability. It observed that, after the competing exchange offers had expired,

> The contest for control was not yet over, . . . because after the expiration of both offers CCI and BPC owned only 41% and 45%, respectively, of the outstanding Piper shares. (A-18)

Although not "at any real disadvantage" in August, CCI lost the contest in the succeeding weeks, when BPC lawfully purchased additional shares in the open market, while CCI lacked the cash or the will to do so:

> CCI made additional purchases of 29,200 shares between August 12 and 18, and then virtually withdrew from the struggle. BPC, on the other hand, continued to purchase for cash . . . . By September 5, it had acquired another 100,614 shares, enough to achieve a majority stockholder position in Piper (839,306 shares or 51%). (A-18)

As Judge Mansfield summed it up:

> [I]t was BPC's cash purchases in the open market of 100,614 shares, as compared with CCI's *capacity* to buy only 29,200 shares, that won control for BPC. (A-116) (emphasis added)

On these facts, there was clearly no showing that the alleged violations denied CCI control of Piper, the injury for which CCI was compensated, or even the chance to compete for control. The court of appeals, however, again invoking *Mills*, simply ignored the need for a causal connection between the violation and the injury for which the plaintiff is compensated.*

Nothing in *Mills* or any other decision of this Court justifies, much less compels, this jump.** *Mills* is perfectly clear about the need to show causation of actual injury before the plaintiff can obtain further relief: "[D]amages should be recoverable only to the extent that they can be shown." 396 U.S. at 389.*** Any doubt about the

---

* And once again, the court made the presumption conclusive. The district court thought CCI had a burden of proving causation and had failed to meet it. (A-144) The court of appeals simply reversed (A-60), giving BPC no opportunity even to offer contrary evidence.

** The court of appeals invoked the *Crane* case, discussed in the note at p. 73, *supra*, to support its finding of causation, but here overlooked the fact that *Crane* allowed the plaintiff to recover damages only if the manipulation should be found on remand "to have deprived it of success in its tender offer." 419 F.2d at 803. And in *Crane* v. *American Standard, Inc.*, 490 F.2d 332 (2d Cir. 1973), a subsequent effort by the court to unravel the "procedural imbroglio," *id.* at 334, that had developed, Judge Friendly specifically instructed the district judge that in determining whether Crane should be awarded damages:

> Certainly it is not to be merely assumed that but for Standard's acts on April 19, 1968, Crane's tender offer would have succeeded and the merger would have failed. *Id.* at 344.

Citing this Court's opinion in *Mills*, he added that,

> Quite conceivably a judge here might find the chain of causation so dubious and the task of determining damages so elusive as to lead him to decide that, except for some items that may be readily provable, he could not properly award anything save perhaps attorneys' fees. *Id.*

*** In *Dasho* v. *Susquehanna Corp., supra*, 461 F.2d at 31, for example, the Seventh Circuit held that *Mills* stood for the proposi-

need for positive proof of causation was expunged by this Court's decision in *Rondeau* v. *Mosinee Paper Co.*, 422 U.S. 49, 64 (1975) where the Court said:

> *Mills* could not be plainer in holding that the questions of liability and relief are separate in private actions under the securities laws, and that the latter is to be determined according to traditional principles.

The present case is one in which the causation issue is a critical one. Judge Friendly made that point in *Zeller* v. *Bogue Electric Mfg. Corp.*, 476 F.2d 795 (2d Cir.), *cert. denied*, 414 U.S. 908 (1973), where the plaintiff sought damages for, among other things, the lost benefits of an underwriting it claimed it could have participated in but for the defendant's unlawful actions. These "consequential damages" for a lost opportunity, he said, could be recovered only if the plaintiff could "establish the causal nexus with a good deal of certainty." *Id.* at 803.

Rather than follow this sound course (as it did on the subsidiary issue of whether CCI could recover interest expense, *see* B-34-35), the court of appeals here wrongly assumed that BPC's challenged actions caused CCI's alleged injury. Since CCI never showed that there was any "reasonable probability that its defeat and damage were connected with the claimed violations" (A-145), it should have been denied monetary relief.

---

tion that flawed proxy material meant that the approval of the merger "was unlawfully obtained," but "that approval caused [plaintiff] monetary injury only if (a) [the company in which plaintiff was a stockholder] would have been better off with no merger at all; or (b) a more favorable exchange ratio would have been available if there had been full disclosure."

IV. The Court of Appeals Awarded CCI an Amount That Far Exceeds CCI's "Actual Damages on Account of the Act Complained of."

Even if the court of appeals had been right in holding that CCI had standing to sue, did not have to show intent to defraud, and was the beneficiary of conclusive presumptions of both reliance by Piper shareholders and causation of injury, it was wrong when it calculated CCI's damages. The court of appeals lost sight of the command of Section 28(a) of the 1934 Act: CCI's recovery must be limited to its "actual damages on account of the act complained of," 15 U.S.C. § 78bb(a) (1970). *See* H.R. Rep. No. 1383, 73d Cong., 2d Sess. 28 (1934).*

The fundamental flaw in the court of appeals' damages decision is that it was not based on the injury supposedly done to CCI. The "act complained of" here was the presumed interference with CCI's "fair opportunity to compete for control of Piper." (A-60) Accordingly, if CCI suffered any "actual damages," the proper way to measure them is to determine the value of control of Piper and to discount that figure to reflect CCI's prospects of actually gaining control. *See generally* W. Prosser, *Law of Torts*, § 130 at 950 (4th ed. 1971); C. McCormick, *Law of Damages*, § 31 at 117-23 (1935); Note, *Developments in the Law—Damages*, 61 Harv. L. Rev. 113, 123 (1947); *cf. Gould* v. *American-Hawaiian Steamship Co.*, [Current] CCH Fed. Sec. L. Rep. ¶ 95,512 at 99,601 (3d Cir. 1976); *Domine* v. *Grimsdall*, [1937] 2 All E.R. 119 (K.B.); *Wachtel* v. *National Alfalfa*

---

* *Cf., e.g., Green* v. *Wolf Corp.*, 406 F.2d 291, 303 (2d Cir. 1968), *cert. denied*, 395 U.S. 977 (1969) (punitive damages cannot be awarded under Section 28(a) since Congress did not intend to permit "recovery of judgments that could often be grossly disproportionate to the harm done").

Journal Co., 176 N.W. 801 (Iowa 1920). The SEC seems to agree with this principle. *See Brief for the United States as Amicus Curiae on Petitions for Certiorari* at 22.

The district court took essentially this approach following the remand in *Chris-Craft II*. In analyzing the court of appeals' instructions,* the district court properly concluded that since the injury was a supposed interference with CCI's chance to gain control, the recovery should equal the "value" of that "opportunity." (B-52) The district court's first step was to calculate "the value of ultimate control of Piper." (B-57) There were severe limitations on the value of control under the circumstances. The district court noted that "the controlling person may not baldly misappropriate this power for his own interests at the expense of the corporation" (B-60) and that, "[i]n the atmosphere of recently decided cases, especially where a vocal opposition exists, the exercise of control is bound to be seriously hedged by restrictions protective of minority interests." (B-63)**

---

* The court of appeals in *Chris-Craft II* had said:

> The measure of damages should be the reduction in the appraisal value of CCI's Piper holdings attributable to BPC's taking a majority position and reducing CCI to a minority position, and thus being able to compel a merger at any time. (A-69)

In the context of a statutory appraisal proceeding, this formula would have produced no damages since the appraisal value of one aspirant's holdings of the target's stock would not be any different after the other aspirant acquired control than before. The district court rejected this approach, however, and awarded substantial damages based on the value of CCI's lost opportunity.

** This Court recently made the same point in a different context, saying in *United States* v. *Byrum*, 408 U.S. 125, 137 (1972) (footnote omitted): "A majority shareholder has a fiduciary duty not to misuse his power by promoting his personal interests at the expense of corporate interests."

Nevertheless, the district court found that under the circumstances a controlling bloc of Piper might have commanded a 5% to 10% premium over the fair market value of the shares at the relevant time. Since the evidence showed that the fair market value of Piper stock was $48.00 on September 5, 1969, the district court found that the value of control on that date was $4.80 per share.* *Cf. Perlman* v. *Feldmann*, 154 F. Supp. 436, 447 (D. Conn. 1957) (control premium determined by first determining fair market value). The district court then discounted that value because CCI lost at most only the opportunity to compete for control against a determined, well-financed aspirant with a large bloc of lawfully acquired shares. This lost opportunity was "generously valued" at $2.40 per share. (B-70) CCI was awarded that amount on each share of Piper it bought during and before the contest, for a total award of $1.6 million.

The court of appeals in *Chris-Craft III* declared this award "quite insubstantial" (B-17) and instead gave CCI a judgment for $25.8 million, fifteen times the value of its lost opportunity as found by the district court. This extraordinary result was premised on a formula that required BPC to pay to CCI

> . . . the difference between the price CCI paid for its Piper stock . . . and the price it could have obtained for it through a public offering after BPC unlawfully acquired control . . . . (B-31)

---

* The ability of a holder of a control bloc to obtain a greater per-share price than non-controlling shareholders is not unquestioned. Professor Andrews, for example, has suggested that the right rule is one which requires that minority stockholders be given an equal opportunity to sell on the same terms as the control bloc is sold. Andrews, ***The Stockholder's Right to Equal Opportunity in the Sale of Shares***, 78 Harv. L. Rev. 505 (1965).

The court of appeals tried to make this formula serve as a measure of the actual decline in the value of CCI's holdings caused by BPC's obtaining control, but it does no such thing. The *Chris-Craft III* formula is really a rescission measure of damages. It makes BPC an insurer of CCI's pre-contest position, even though BPC did not induce CCI to purchase a single Piper share and even though the post-contest market decline was unrelated to "the act complained of." It gives CCI more than CCI would have if it had won the contest. It was plain error.

One mistake in the *Chris-Craft III* formula was using the supposed historical cost ($64) of CCI's Piper shares as the minuend.* Not even the court of appeals thought that CCI had a right to be indemnified for this voluntary expenditure. Instead, the court justified using a historical cost figure by saying that the value of CCI's Piper shares just before BPC acquired its majority position may have included a premium reflecting CCI's chance to gain control, and so had to be at least equal to CCI's average historical cost. (B-25-26) This was simply untrue. CCI had bought these shares at various prices, for cash and in exchange for securities, over the preceding eight months, during part of which time the control contest raged.** By September 5, 1969, according to the district court's findings, the fair market *value* of a Piper share,

* Actually, the $64 figure was the book value of the shares and included expenses (such as attorney's fees and carrying costs) for which CCI was not entitled to be compensated even under the *Chris-Craft III* decision. However, since the court of appeals refused to remand for a hearing, BPC was never able to introduce evidence on this point. *See* p. 92, *infra*.

** Of course, the price an aspirant for control may be willing to pay for a target company's shares at one point in a contest does not demonstrate their value at a later point. *Pierre J. LeLandais & Co.* v. *MDS-Atron, Inc.*, No. 75-7108 (2d Cir., May 5, 1976) (slip op. at 3538) (Timbers, J.).

even as part of a control bloc, was at most $52.80 (B-57, 70), at least $11 less than CCI's supposed *cost*. Since CCI had paid far more than $52.80 for its Piper stock, it had made a bad investment; but the economic loss it suffered cannot be attributed to BPC, which suffered the same loss.*

Another and even more substantial mistake was using as the subtrahend the hypothetical selling price ($27) of CCI's Piper shares in January 1970, five months after BPC gained control and the alleged injury was done. The long delay was based on an assumption—never briefed or argued—that CCI would have had to register its Piper shares and that it would take that long to do it.** But the January 1970 price obviously does not show what the value of a minority bloc of Piper was at the time BPC gained control in September. The effect of using the January 1970 sale price here was to compensate CCI for the steep market decline in stocks generally and in light-aircraft stocks in particular, even though that decline was unrelated to any act of BPC's. The SEC

---

* Learned Hand's dictum in *Borg* v. *International Silver Co.*, 11 F.2d 147, 152 (2d Cir. 1925), to the effect that the value of shares is what people will pay for them does not, as the court of appeals here thought (B-22), establish as a matter of law that no securities plaintiff ever mistakenly pays too much. It does not, for example, moot the provision of Section 11(e) of the 1933 Act, 15 U.S.C. § 77k(e) (1970), expressly permitting proof that plaintiff overpaid for his stock. And it clearly does not support the notion that CCI's Piper shares had to be worth on September 5, 1969, what CCI had previously paid for them.

** Registration would be required only if CCI were deemed a "controlling person" of Piper in spite of the fact that it lost the control contest. *See* Sections 2(11), 4(1) and 5 of the 1933 Act, 15 U.S.C. §§ 77b(11), 77d(1) and 77e (1970). A recognized authority in this area has said that registration would not be required in a situation like the one here, since BPC, not CCI, had achieved control. E. Aranow & H. Einhorn, *Tender Offers for Corporate Control* 216 (1973).

agrees with this, as it must, for it conceded to this Court in opposing certiorari that

> . . . the use of the January 1970 date appears to compensate Chris-Craft for a loss caused by a post-injury decline in the market value of Piper stock of approximately $15 per share—a loss that Chris-Craft would have sustained even if [BPC] had not violated the securities laws and, indeed, even if Chris-Craft itself had succeeded in the contest for control . . . . *Brief for the United States as Amicus Curiae on Petition for Certiorari* at 23, n. 14.

BPC, the "winner," suffered the very same per share "damages"—the post-contest market decline—the court of appeals ordered it to pay CCI as part of the compensation for losing.*

Compensating CCI for unrelated market declines in an implied cause of action stands in stark contrast to the recovery allowed by Congress in express causes of action under the securities laws. Suppose a case far worse than this one: a false prospectus on the basis of which the plaintiff decides to buy. This defrauded buyer has an express cause of action under Section 11 of the 1933 Act. But he cannot be awarded damages for economic losses due to a general market decline because Section 11 itself, 15 U.S.C. § 77k(e) (1970), prevents recovery for "the depreciation in value of" a security due to factors other than an untruth or omission in the prospectus.** Surely

* Conversely, if the market value of Piper stock had increased, the difference between winning and losing would be greater, but there would be no damages at all under the *Chris-Craft III* formula.

** *Feit* v. *Leasco Data Processing Equip. Corp.*, 332 F. Supp. 544, 586 (E.D.N.Y. 1971), a Section 11 case, demonstrates the point well. In measuring damages, the court took "judicial notice of the very

the same result should have been reached in a new judicially implied cause of action under which the plaintiff can, by congressional command, recover only his "actual damages on account of the act complained of."

Finally, the court of appeals seriously erred in failing to reduce the award to take into account the fact that CCI lost, at the very most, only an opportunity to compete for control of Piper against a vigorous and well financed opponent that had the support of the target's management. As the SEC has told this Court, a failure to adjust damages to reflect the reality of CCI's chance to gain control risks "substantial overcompensation of the defeated contestant," which lost only its "expectancy." *Brief for the United States as Amicus Curiae on Petition for Certiorari* at 22. By refusing to discount to reflect CCI's chance of gaining control of Piper, the court of appeals in effect assumed—despite the overwhelming evidence to the contrary and its own (and the district court's) opinions over the previous six years —that CCI would have won the contest in the absence of BPC's questioned acquisitions.*

---

drastic general decline in the stock market in 1969" and held that the "damage figure should be adjusted to take account of the market decline."

* The court of appeals had one specific criticism of the way the district court actually did its calculations. The district court found the fair market value of Piper stock—$48 per share—by analyzing "the objective components of that value, as recognized by the experts" on the basis of "an anonymous 100-share block . . . ." (B-52) The court of appeals said it should have taken account of the fact that "CCI held an illiquid 700,000 share minority block" (B-19), whose value the court assumed must be less per share than the value of a 100-share bloc.

The court of appeals was wrong on both the law and the facts. CCI was neither induced to buy nor forced to sell Piper shares, has never in fact sold them, and retains the intrinsic value of its investment in Piper. The most it suffered was interference with its opportunity to gain control. Any imagined effect on the intrinsic value

The cases the court of appeals cited to support the *Chris-Craft III* damage formula were far different from this one. *Chasins* v. *Smith, Barney & Co.*, 438 F.2d 1167 (2d Cir. 1970), involved a stockbroker that recommended and sold over-the-counter stock to the plaintiff without disclosing that it was making a market in that stock, and so stood to benefit more from the sale of this stock than other stock. The plaintiff relied on the broker's "strong recommendations" without knowing of the broker's self-interest. *Id.* at 1172. Under the usual federal securities law measure of damages, which awards the plaintiff the difference between the price paid (or received) and the real value of the stock on the date of the transaction,*

---

because of the illiquidity of a large bloc will affect both a 51% bloc and a 42% bloc and is unrelated to the value of the lost "opportunity."

Nor did the court of appeals take into account that BPC did not have meaningful control. BPC held 51% of the Piper stock to CCI's 42%, but BPC had been ordered to offer rescission as to 7%, and not to vote that 7% and another 7% for five years; injunctions also prohibit any merger and any change in Piper's charter or by-laws or the size of its Board. (B-71-75) As a result of cumulative voting, BPC could elect only four out of Piper's eight directors. (B-50, n. 6) For all these reasons, the chances that BPC could "compel a merger at any time" (A-69) were in fact non-existent; were BPC to do so, of course, CCI would receive fair value just like any other dissenting shareholder. Under all these circumstances, it was not improper for the district court to use the $48 figure as a basis for determining the value of CCI's 42% bloc as compared to CCI's opportunity, absent BPC's missteps, of acquiring a control bloc.

* *See Affiliated Ute Citizens* v. *United States*, 406 U.S. 128, 155 (1972); *Thomas* v. *Duralite Co.*, 524 F.2d 577, 586 (3d Cir. 1975); *Harris* v. *American Investment Co.*, 523 F.2d 220, 224-25 (8th Cir. 1975), *cert. denied*, 96 S. Ct. 784 (1976); *Zeller* v. *Bogue Elec. Mfg. Co.*, 476 F.2d 795, 801-03 (2d Cir.), *cert. denied*, 414 U.S. 908 (1973); *Estate Counseling Service, Inc.* v. *Merrill Lynch, Pierce, Fenner & Smith*, 303 F.2d 527, 533 (10th Cir. 1962); *cf. Gerstle* v. *Gamble-Skogmo, Inc.*, 478 F.2d 1281, 1307 (2d Cir. 1973).

the plaintiff in *Chasins* might have recovered nothing, since he had apparently paid the lowest generally available price. *Id.* at 1173; *cf. id.* at 1176 (Friendly, J., dissenting from denial of rehearing en banc). The *Chasins* court said that this was irrelevant, however, since the plaintiff's "decision to purchase at all" came "on Smith, Barney's recommendation." *Id.* at 1173. "[T]he fact of being *induced* to buy . . . without disclosure of Smith, Barney's interest" was "the evil" by which damages should be measured. *Id.* (emphasis added). The court therefore approved a rescission measure of damages—the difference between the purchase price and the amount the plaintiff obtained when he sold the stock about a year later. Inducement to purchase was also the injury in *Esplin* v. *Hirschi*, 402 F.2d 94, 104 (10th Cir. 1968), *cert. denied*, 394 U.S. 928 (1969), the other case cited by the court of appeals here.

Even if *Chasins* was rightly decided, it cannot control this case. Rescission or a rescission measure of damages can only be justified where, as in *Chasins*, the plaintiff was induced to act by the defendant's violations. *See, e.g., Gordon* v. *Burr*, 506 F.2d 1080, 1085 (2d Cir. 1974); *cf. Sargent* v. *Genesco, Inc.*, 492 F.2d 750, 761 (5th Cir. 1974).* In that kind of case it may be appropriate to undo the transaction and thus indemnify the plaintiff even for market losses because the wrong is that he was induced to buy at all. *Cf. Myzel* v. *Fields*, 386 F.2d 718, 742 (8th Cir. 1967), *cert. denied*, 390 U.S. 951 (1968) (relying on Section 29(b) of the 1934 Act, which voids contracts made in violation of the Act, to

---

* *See generally*, Note, *The Measure of Damages in Rule 10b-5 Cases Involving Actively Traded Securities*, 26 Stan. L. Rev. 371, 372-76 (1974).

award damages based on rescission).* But CCI was obviously not induced by BPC to buy Piper shares. CCI entered the contest before BPC. It must have recognized the risk that, for reasons unrelated to the contest, the market value of the Piper securities it was buying could rise or fall. In these circumstances it was plainly wrong to make BPC bail CCI out of its own "misadventure" (A-160) and restore it to its precontest position. This kind of windfall is what Congress prohibited when it expressly limited a plaintiff's recovery to his "actual damages on account of the act complained of."

Accordingly, if the Court holds that BPC is liable to pay damages to CCI in addition to the equitable relief already granted, it should reverse the court of appeals and order that the judgment of the district court on damages be reinstated.

V. The Court of Appeals' Failure To Remand for a Calculation of Damages and for a Reconsideration of the Award of Prejudgment Interest Denied Petitioners Due Process of Law.

Having developed a new (and erroneous) measure of damages in *Chris-Craft III*, the court of appeals proceeded to calculate damages itself on the basis of the record created under the *Chris-Craft II* formula and then to "affirm" the award of prejudgment interest from about $600,000 to more than $10 million. This circumvention of evidentiary proceedings on newly relevant factual issues was plain error.

In order to calculate CCI's damages under the *Chris-Craft III* formula without remanding, the court of appeals made a number of critical findings of fact without

---

* *See also* Weiskopf, *Remedies Under Rule 10b-5*, 45 St. John's L. Rev. 733, 751 (1971).

hearing, testimony, argument, or adequate basis in the record. Among them were that CCI's cost for its Piper stock was \$63.98 per share (B-25); that a registration statement would have been required for a public offering of CCI's Piper stock (B-29); that the "earliest realistic date" (*id.*) for such an offering was the end of January 1970; and that in January 1970, CCI would have realized only \$27 per share in a public offering. (*Id.*)*

Since the district court had proceeded on an entirely different theory of how CCI's damages should be calculated, the parties had had no warning of the need to present, and had not presented, evidence bearing on those issues. Had it been permitted to offer pertinent evidence, BPC could, for instance, have shown that registration would not have been required for a public offering of Piper stock by CCI and that even if a registration statement had been required it would not have delayed an offering for five months of steady market decline. BPC could also have shown that CCI's alleged cost of \$63.98 per Piper share included interest, legal and other expenses not recoverable even under the new test. And BPC could have shown that the price CCI could have obtained for its Piper shares on the date of the hypothetical sale was greater than \$27 per share.

To take only one example of how unfair it was to deprive BPC of any opportunity to introduce evidence on these issues, the CCI witness on whose testimony the court of appeals relied for the \$27 figure had testified

---

* The court of appeals did this by selecting excerpts from evidence submitted for other purposes. For example, the last two of these "findings"—critical matters, involving millions of dollars—were based on two paragraphs in the testimony of one CCI witness who was not credited by the district court. (*Compare* B-29 *with* B-64 n.18; *see* App. 2451A; EV 835)

that a public offering in November 1969 (instead of January 1970) would have brought $33 per share (instead of $27 per share). (B-29 n. 22) As it happens, $1 per share translates into about $1 million in damages and interest. BPC, wholly unaware that the difference between those hypothetical dates would be determinative, was denied a "fair opportunity" to fight for this six million dollars.

In these circumstances, the court of appeals seriously erred in refusing to remand for a hearing. This Court has consistently insisted that due process requires no less. *E.g.*, *Byrd* v. *Blue Ridge Rural Electric Cooperative, Inc.*, 356 U.S. 525 (1958). *See also Fountain* v. *Filson*, 336 U.S. 681 (1949); *Marconi Wireless Telegraph Co.* v. *Simon*, 246 U.S. 46 (1918); *Saunders* v. *Shaw*, 244 U.S. 317 (1917).

In *Byrd*, for example, the plaintiff had sued for damages for personal injuries allegedly caused by the defendant's negligence. The defendant had asserted that the claim was barred by the South Carolina Workmen's Compensation Act. The district court struck the defense, ruling that one essential element had not been shown. The court of appeals reversed, holding that the unproved element was not essential and that the defendant had proved all elements that were. It then directed that judgment be entered for the defendant. This Court reversed, holding that the plaintiff, who had introduced no evidence bearing on the other elements of the defense in view of the district court's order granting his motion to strike, was "plainly entitled to have an opportunity to try the issue under the Court of Appeals' interpretation." 356 U.S. at 532. In language applicable to the court of appeals decision in *Chris-Craft III*, Mr. Justice Brennan, writing for the Court, explained:

> The [plaintiff] was fully justified in that circumstance in not coming forward with proof of his own at that stage of the proceedings, for he had nothing to meet under the District Court's view of the statute. He thus cannot be penalized by the denial of his day in court to try the issue under the correct interpretation of the statute. *Id.* at 533.

BPC likewise had no occasion ever to have introduced evidence pertaining to the factual issues ultimately held to be determinative by the court of appeals. Neither the statute cited by the court of appeals* nor the cases it relied on** provide any support for denying BPC its day in court on newly relevant factual issues of major importance.

In an effort to justify its decision to calculate CCI's damages itself the court of appeals adverted to "the extraordinary length of time this litigation has already lingered." (B-24, quoting *Georgia-Pacific Corp.* v. *U.S. Plywood-Champion Papers, Inc.*, 446 F.2d 295, 299 (2d Cir.), *cert. denied,* 404 U.S. 870 (1971)) But this

---

* 28 U.S.C. § 2106 (1970). This statute simply gives this Court and the courts of appeals the power, among other things, to "direct the entry of such appropriate judgment, decree, or order . . . as may be just under the circumstances." It provides no authority for an appellate court to override the elementary requirements of due process.

** None of the cases cited by the court of appeals involved disputed evidentiary issues turning on credibility. *See Dopp* v. *Franklin Nat'l Bank,* 461 F.2d 873, 879 (2d Cir. 1972) (reversing the grant of a preliminary injunction that the district court had entered solely on the basis of pleadings, affidavits and depositions, without taking any oral testimony); *Simpson* v. *United States,* 322 F.2d 688, 693-94 (5th Cir. 1963) (determination of damages involved only "mathematical calculations"); *Dale Benz, Inc.* v. *American Cas. Co.,* 303 F.2d 80, 82 (9th Cir. 1962) (determination of damages involved only "figures and arithmetical calculations"); *McComb* v. *Utica Knitting Co.,* 164 F.2d 670, 674 (2d Cir. 1947) (evidence pertaining to damages consisted solely of a sampling of time sheets).

Court has firmly established that impatience with the demands of fair procedures is no warrant for the abandonment of those procedures. As Mr. Justice Cardozo wrote in *Ohio Bell Telephone Co.* v. *Commission,* 301 U.S. 292, 305 (1937):

> There can be no compromise on the footing of convenience or expediency, or because of a natural desire to be rid of harassing delay, when that minimal requirement [of a hearing] has been neglected or ignored.

See also Fuentes v. *Shevin,* 407 U.S. 67, 90 n. 22 (1972).*

The injustice to BPC was further compounded by the court of appeals' "affirmance" of the award of prejudgment interest from $600,000 to more than $10 million. Prejudgment interest "is not recovered according to a rigid theory of compensation for money withheld, but is given in response to considerations of fairness. It is denied when its exaction would be inequitable." *Blau* v. *Lehman,* 368 U.S. 403, 414 (1962), quoting from *Board of Commissioners* v. *United States,* 308 U.S. 343, 352, (1939).**

---

* The procrustean quality of the court of appeals' other rationales for its refusal to remand is striking. While the experts who testified on remand in *Chris-Craft II* submitted written reports, it was altogether wrong to declare for that reason alone that the evidence on damages was "largely documentary." (B-23) On the contrary, the district court in its opinion on relief emphasized the importance of the experts' oral testimony, especially on cross-examination, in deciding what weight to attach to their conflicting testimony. (B-70) The court of appeals also had no right to assume (B-24) that its new formula would not bring forth new evidence. *Saunders* v. *Shaw,* 244 U.S. 317, 319 (1917).

** *Accord, Sanders* v. *John Nuveen & Co.,* 524 F.2d 1064, 1075 (7th Cir. 1975), *vacated on other grounds,* 96 S. Ct. 1659 (1976); *Thomas* v. *Duralite Co.,* 524 F.2d 577, 589 (3d Cir. 1975); *Occidental Life Ins. Co.* v. *Pat Ryan & Assoc., Inc.,* 496 F.2d 1255, 1268-69 (4th Cir.), *cert. denied,* 419 U.S. 1023 (1974); *Wolf* v.

The district court had in its equitable discretion found an award of $600,000 in prejudgment interest to be appropriate. The court of appeals purported to be deferring to that judgment (*not* exercising its own discretion) when it affirmed the award into approximately $10 million. (B-33) Yet this same court of appeals had, only a few years before, expressly recognized that the amount involved should be an important consideration in whether such interest should be awarded. *See Norte & Co.* v. *Huffines*, 416 F.2d 1189, 1191 (2d Cir. 1969), *cert. denied sub nom. Muscat* v. *Norte & Co.*, 397 U.S. 989 (1970). Plainly, the award, even if proper in the first place, should have been reconsidered in light of a fifteen-fold increase in the amount.

Frank, 477 F.2d 467, 479 (5th Cir.), *cert. denied*, 414 U.S. 975 (1973); *Wessel* v. *Buhler*, 437 F.2d 279, 284 (9th Cir. 1971).

CONCLUSION

For the reasons stated, the judgment of the court of appeals should be reversed.

Respectfully submitted,

LLOYD N. CUTLER
MANUEL F. COHEN
LOUIS R. COHEN
STEPHEN F. BLACK
WILLIAM T. LAKE
MICHAEL S. HELFER
WILLIAM J. KOLASKY, JR.

WILMER, CUTLER & PICKERING
1666 K Street, N.W.
Washington, D.C. 20006

Counsel for Petitioners

JAMES V. RYAN
ROGER L. WALDMAN
C. KENNETH SHANK, JR.
ALLAN J. GRAF

WEBSTER & SHEFFIELD
One Rockefeller Plaza
New York, New York 10020

CHARLES ALAN WRIGHT
2500 Red River Street
Austin, Texas 78705

DUDLEY C. PHILLIPS
JOHN J. MARTIN
One Greenwich Plaza
Greenwich, Connecticut 06830

Of Counsel

June 9, 1976

ADDENDUM

Section 10(b) of the 1934 Act, 15 U.S.C. § 78j(b), provides:

> "It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—
>
> * * *
>
> "(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors."

Section 14(e) of the 1934 Act, 15 U.S.C. § 78n(e), provides:

> "(e) It shall be unlawful for any person to make any untrue statement of a material fact or omit to state any material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, or to engage in any fraudulent, deceptive, or manipulative acts or practices, in connection with any tender offer or request or invitation for tenders, or any solicitation of security holders in opposition to or in favor of any such offer, request, or invitation. The Commission shall, for the purposes of this subsection, by rules and regulations define, and prescribe means reasonably designed to prevent, such acts and practices as are fraudulent, deceptive, or manipulative."

Section 28(a) of the 1934 Act, 15 U.S.C. § 78bb(a), provides:

"(a) The rights and remedies provided by this chapter shall be in addition to any and all other rights and remedies that may exist at law or in equity; but no person permitted to maintain a suit for damages under the provisions of this chapter shall recover, through satisfaction of judgment in one or more actions, a total amount in excess of his actual damages on account of the act complained of. Nothing in this chapter shall affect the jurisdiction of the securities commission (or any agency or officer performing like functions) of any State over any security or any person insofar as it does not conflict with the provisions of this chapter or the rules and regulations thereunder."

Act of June 25, 1948, c. 646, 62 Stat. 963, 28 U.S.C. § 2106, provides:

"The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances."

Rule 10b-5 under the 1934 Act, 17 C.F.R. § 240.10b-5, provides:

"It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

"(a) To employ any device, scheme, or artifice to defraud,

"(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

"(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,

in connection with the purchase or sale of any security."

Rule 10b-6 under the 1934 Act, 17 C.F.R. § 240.10b-6, provides in pertinent part:

"(a) It shall constitute a 'manipulative or deceptive device or contrivance' as used in section 10(b) of the act for any person, . . .

"(2) Who is the issuer or other person on whose behalf such a distribution is being made . . .

directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange, either alone or with one or more other persons, to bid for or purchase for any account in which he has a beneficial interest, any security which is the subject of such distribution, or any security of the same class and series, or any right to purchase any such security, or to attempt to induce any person to purchase any such security or right, until after he has completed his participation in such distribution: *Provided, however,* That this section shall not prohibit . . . (ii) unsolicited privately negotiated purchases, each involving a substantial amount of such security, effected neither on a securities exchange nor from or through a broker or dealer; . . .

* * *

"(b) The distribution of a security (1) which is immediately exchangeable for or convertible into another security, or (2) which entitles the holder thereof immediately to acquire another security, shall be deemed to include a distribution of such other security within the meaning of this section. . . ."

In The

Supreme Court of the United States

October Term, 1976

No. 75-355

Bangor Punta Corporation, Nicolas M. Salgo,
and David W. Wallace,
Petitioners,
v.

Chris-Craft Industries, Inc.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

REPLY BRIEF FOR PETITIONERS WITH ADDENDUM IN RESPONSE TO THE BRIEF OF THE SECURITIES AND EXCHANGE COMMISSION

James V. Ryan
C. Kenneth Shank, Jr.
Allan J. Graf

Webster & Sheffield
One Rockefeller Plaza
New York, New York 10020

Charles Alan Wright
2500 Red River Street
Austin, Texas 78705

Lloyd N. Cutler
Manuel F. Cohen
Louis R. Cohen
Stephen F. Black
William T. Lake
Michael S. Helfer
William J. Kolasky, Jr.

Wilmer, Cutler & Pickering
1666 K Street, N.W.
Washington, D.C. 20006

Counsel for Petitioners

Of Counsel

Dudley C. Phillips
John J. Martin
One Greenwich Plaza
Greenwich, Connecticut 06830

INDEX

INDEX—Continued

TABLE OF AUTHORITIES

CASES: Page

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-355

BANGOR PUNTA CORPORATION, NICOLAS M. SALGO, AND DAVID W. WALLACE,
Petitioners,

v.

CHRIS-CRAFT INDUSTRIES, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

REPLY BRIEF FOR PETITIONERS WITH ADDENDUM IN RESPONSE TO THE BRIEF OF THE SECURITIES AND EXCHANGE COMMISSION

PREFACE: THE SEC BRIEF

The SEC's 195-page amicus Brief was filed on Friday, September 3, 1976, more than a month out of time.* It

---

* *See* Rule 42(2) of this Court. Respondent's Brief was due and filed on August 2.

is not signed by the Solicitor General or anyone in his office, and it departs in significant respects from the views of the United States in its Brief on Certiorari, which counsel for the SEC also signed. (*See* SEC Brief at 197-98).

The Clerk has advised us that the briefs in chief have been distributed and that the case has been set for argument on October 6. Under these circumstances, in order to provide a response in time to be useful to the Court, we have included in this Brief in reply to CCI a short Addendum answering the remarkably few relevant points in the SEC Brief. *See* p. 54, *infra*.

REPLY TO CCI'S STATEMENT OF THE CASE

Petitioners agree with CCI (CCI Brief at 5) that the facts of this case have been established and only legal issues remain. All the essential facts were found by the district court, and these findings were affirmed by the court of appeals. (*E.g.*, A-47, 56) But the court of appeals made serious errors of law, which CCI seeks to overcome by a misleading presentation of the facts to this Court.

CCI's Misleading "Conspiracy" Theory

In an effort to make BPC's two technical violations seem more significant, CCI tries to picture all the defendants as members of a continuing conspiracy seeking its defeat. The picture simply is not true. The alleged violations by the Piper family took place in January 1969, when BPC had never met the Pipers and had no interest in Piper. (App. 312A-15A) BPC first met with the Pipers late in April, at what CCI artfully calls a "summit conference" (CCI Brief at 9), and only then began its quest for Piper shares. (A-14; App. 316A-26A,

1815A-22A) CCI's case against BPC, Salgo, and Wallace is based solely on two alleged violations by BPC in its own pursuit of shares, not on any alleged BPC interference with CCI's pursuit. Both of these violations are misleadingly described in CCI's Brief.*

CCI's Misstatement of the Rule 10b-6 Issue

CCI says, over and over, that it "obeyed" while BPC "defied" the SEC and its own counsel, but this assertion is misleading as to CCI and false as to BPC. What actually happened, in chronological order, is as follows:

In December 1968 and January 1969, CCI made substantial cash purchases of Piper stock (A-9-10), but these all but ceased early in February when CCI ran out of cash and could only borrow money at an effective interest rate of 43.11%. (A-114-15) On February 27, 1969, CCI announced an exchange offer to Piper shareholders. Thereafter, CCI "violated" Rule 10b-6 (just as BPC has been held to have violated it) by purchasing a small number of Piper shares (9,100) for cash over the New York Stock Exchange, on the advice of distinguished

---

* CCI also implies violations not involved in this case. BPC made a perfectly lawful contingent agreement to pay the Piper individuals an additional amount per share to give them the same amount it was offering to all other Piper shareholders ($80 per share). (A-14-15) CCI tries to cast a shadow on this agreement by calling it a "bonus" and then implies (CCI Brief at 10-11) that the Pipers and BPC both concealed this agreement when in fact BPC described the agreement fully in its exchange offer prospectus (A-40 n. 17; EV 30-31) and had nothing to do with what the court of appeals called the Pipers' "harmless" (A-63) omission from their communications with Piper shareholders. CCI also seeks to make something of BPC's announcement that it would offer securities valued at $80 per Piper share, despite the findings below that the announcement was truthful, was not material, did not damage CCI, and offered no basis for liability. (A-42-43 & n. 19)

counsel that such purchases were lawful.* (A-13; App. 401A)

On April 7, 1969, the SEC staff summoned CCI to a private meeting and told it that in the staff's view CCI's purchases since February 27 had been in violation of Rule 10b-6. CCI likes to imply that after April 7 it followed the staff's advice and was hurt, but the fact is that because of its cash shortage CCI had not been able to make more than trivial purchases for more than two months before its private warning.

On April 20, 1969, BPC began its quest for control of Piper. BPC did not know of the SEC staff's position. (C-30-31) There was then no public indication that the SEC staff thought purchases of a target company's stock by an exchange offeror violated Rule 10b-6. (C-45) Nor was there ever any private SEC staff warning to BPC, as there had been to CCI.**

An April 23 BPC strategy memo listed certain large blocks of Piper stock that would be worth pursuing. CCI tries mightily (Brief at 11-12) to leave the impression that there was something improper about this strategizing, but on April 23 BPC had received no hint of any kind that it should not seek these shares.*** Moreover,

* On the theory of the court of appeals in this case, if CCI had achieved a less-than-9,100 share majority of Piper shares, it would now be liable to BPC for at least $36 million.

** The only explanation for this was offered by CCI's counsel, who said in oral argument below, "the SEC goofed, they forgot to tell them." *Piper Proves Elusive Prize*, Business Week, Aug. 16, 1969, at 64.

*** CCI seems fond of using the name "Cornfeld," especially in bold face type. The fact that the mutual fund from which BPC purchased some Piper shares had been managed by Bernard Cornfeld has nothing to do with this case. Even less excusable is CCI's dropping the name "Voloshen," CCI Brief at 73 n. *, after the district court barred evidence concerning that name on the ground that Salgo's alleged contacts with him had no connection whatever with this case. (App. 46A-1)

on April 23, BPC was contemplating a cash tender offer, not an exchange offer (App. 317A, 383A), and if it had made a cash offer its purchases would not have violated Rule 10b-6 under any theory.

It was not until May 5 that the SEC announced its *proposed* Rule 10b-13, in a release including the statement that one provision of the proposed rule was "in effect, a codification of existing interpretations under Rule 10b-6 . . . ." That statement, which is the only "warning" that BPC or its counsel ever received, turned out to be untrue.* No one (not even the SEC in its Brief in this Court) has ever pointed to any prior published statement by the SEC or its staff suggesting that Rule 10b-6 could be so interpreted. (C-16, 45)**

Shortly after May 5, as CCI backhandedly acknowledges (CCI Brief at 13), BPC's inside counsel and outside counsel both advised BPC that in their opinion the May 5 release was wrong about Rule 10b-6 and BPC could lawfully make cash purchases of Piper stock. (App. 1644A-46A) BPC's inside counsel nevertheless cautioned management that it would be prudent to make only unsolicited, off-exchange purchases that would clearly conform to the spirit of the large block exemption from Rule 10b-6. *Id.*

---

* Contrary to what CCI implies (CCI Brief at 32) it was in the face of the May 5 Release that Chief Judge Lumbard said that BPC was an "innocent party" (C-30 n. 4) that "did not then know of any rule or interpretation precluding the transactions . . . ." (C-22)

** The purpose of Rule 10b-13 as stated in the May 5 Release was to prevent tender offerors from paying some shareholders of the target company more (or less) in non-tender-offer purchases than the tender offer price. SEC Release No. 34-8595 (May 5, 1969). Rule 10b-13 itself did not become effective until October 8 and is not applicable to this case. SEC Release No. 34-8712 (Oct. 8, 1969). CCI's case, of course, has never been based on any such discrimination, and there was no discrimination in fact: the shares in question were all purchased at prices slightly (but only slightly) *less* than the $80 per share that BPC offered to the public. (A-16)

Between May 14 and May 23, BPC made three cash purchases of large blocks. The district court said, as to these purchases:

> If we lay the transactions complained of against the intent behind the words of the exemption provisions [for large block purchases] it becomes clear that the block purchases fell within the intent of the exemption, if not within its words. (A-151)

Although the court found, after the fact, that BPC's large block purchases were not "within the words" of the large block exemption, there is no basis in the record for CCI's repeated but false assertion that BPC defied either the SEC or its own experienced counsel. As CCI's Brief reluctantly admits, the district court found "that the purchases were innocent." (CCI Brief at 33) And two of the three judges in the court of appeals, while predicating liability on the technical violation, expressly accepted the district court's findings (A-150-53) that there was neither manipulative intent nor manipulative effect. (Gurfein, A-96; Mansfield, A-111)

CCI's Misstatement of the BAR Issue

CCI's description of BPC's only other alleged violation, the BAR omission, seeks to leave the impression that BPC incurred or anticipated a loss on its investment in the BAR, which it then concealed. This was the theory of CCI's complaint, but it was flatly rejected both by the district court ("the evidence . . . unequivocally negates any such purpose or plan," D-11; *see* A-143) and by the court of appeals. (A-47)

BPC's carrying value for its BAR investment was \$18.4 million, a figure derived (as stated in note 1 to the balance sheet in the 1969 exchange offer prospectus, EV 99) from a 1965 "market price evaluation." No court ever ruled either that the 1965 derivation of that

figure was wrong or that the suspended 1969 negotiations should have caused BPC either to record a loss on its income statement or to reduce the carrying value of the BAR on its balance sheet.* What the district court and the court of appeals both said was that since the figure was based on an earlier appraisal, BPC should have disclosed the negotiations as circumstances indicating that the appraisal was "obsolete." (A-43-47, 122, 142-45; D-14)

The district court flatly and repeatedly found that the failure to disclose those circumstances involved no intent to mislead anyone (D-14) or "improper purpose" (*id.*) or "bad faith." (*Id.*) On these grounds, it denied the SEC's request for an injunction against future violations (D-17), and CCI's bid for money damages. (A-143-44) The court of appeals, for all the general and somewhat inconsistent discussion in all three opinions of the meaning of "scienter," flatly agreed with the district court's findings of fact: "Nor does the evidence show that BPC failed to disclose the sales negotiations in bad faith." (Timbers, A-47); "[I]ntent to defraud has not been shown . . . ." (Mansfield, A-103); "[the finding that] there was no intent to mislead on the part of BPC in carrying BAR at $18.4 million on the balance sheet . . . [was] supported by substantial evidence [and] cannot be rejected by us." (Mansfield, A-118-119)

The courts below found simply that the $18.4 million figure should have been accompanied by "[s]ome caveat or reference to the negotiations" (Mansfield, A-122), and that BPC's failure to do so might have been misleading but was not in bad faith. The courts below expressly

* To the contrary, Judge Mansfield pointed out, concurring, that an immediate writedown might be "misleading," and that "a person able to read a balance sheet would probably have recognized that such 'historical' cost did not necessarily represent current liquidating value." (A-122-23)

rejected CCI's claim that there was a "BAR loss" to announce.*

CCI's attempt to portray the later sale of the BAR as "bad news" for BPC (CCI Brief at 23 n. *) is also misleading. The BAR, which at the $18.4 million figure accounted for 6% of BPC's assets, was shown in the exchange offer prospectus as having had less than $60,000 of net income in the previous year (1968), about 1% of BPC's 1968 income.** (EV 47, 60) The eventual sale of the BAR, although it involved an "extraordinary" loss for book purposes (*see* D-6), was apparently not regarded by the market as an unfavorable development, since the price of BPC's stock went up. (App. 591A) This fact alone confirms the district court's conclusion that there was "no purposeful connection between the nondisclosure and the contest for control." (D-14)

CCI's Misstatement of the Causation and Damages Issues

Although CCI repeatedly accuses petitioners of "speculation" because they ask that CCI prove causation of injury, it was CCI's $36 million judgment that required a whole series of unwarranted speculations. The court of appeals' judgment necessarily rests on the premises that absent the BAR omission the tendering Piper share-

---

* CCI misquotes the district court on this critical point. It has the court saying that "[d]isclosure 'would involve the loss [of] ($4.32 per share) . . . .'" (CCI Brief at 19) But the intended implication, that the district court believed BPC should have reported such a loss, is false. What the district court actually said was that the *possible* sale, which the court had just found BPC had *not* agreed to, would have involved a loss of that amount. (*See* D-15) The disclosure required by the district court (D-14) and the court of appeals (A-45, 122-23) would not have involved any loss or writedown.

** Even 7% interest on the $5 million offered and eventually received on the sale of the BAR would have produced pre-tax income of $350,000 per year.

holders would have rejected BPC's exchange offer; that, in addition, the violations "actually reversed the outcome" (CCI Brief at 80) of the contest for control of Piper (for otherwise CCI would have been stuck with the same "albatross" it now complains of); and that a share in a control block would have been worth at least $64. Reaching these premises requires the substitution of speculation for proof at every stage.

The district court, having applied a "might have hesitated" standard of materiality (D-15), found no proof that the BAR omission influenced any tendering Piper shareholder. (A-145) But the court of appeals substituted an irrebuttable presumption that BPC's offer would not "have attracted any takers." (A-60)

The district court (A-145) and the court of appeals (A-56) found no proof that CCI would have gained control under any circumstances. CCI had "'shot its bolt' in the financial sense," by early February. (A-114) But in this Court CCI injects the speculation of its own witness that it would have had a "99-1 assurance of victory." (CCI Brief at 23) The district court specifically rejected this speculation "as a matter of business experience and common sense in a situation where there is a bidder with greater resources at his command." (B-64 n.18)

The courts below found *after* both of BPC's violations that CCI was "still in a position" to gain control of Piper (C-47) and that CCI had not alleged that BPC's violations had placed it "at any real disadvantage." (C-9) But CCI here speculates that BPC's 4% lead would have been "virtually unbeatable" (CCI Brief at 22) even if CCI had not voluntarily "withdr[awn] from the struggle." * (B-7)

---

* This speculation is based on the absurd argument that because BPC had a 45%-41% lead it "could pay double the price per share

Finally, CCI's whole award is based on the unsupported and unwarranted speculation that if it had gained control its shares would have been worth $64 each and would have remained at that value. In fact, the district court found that a control share would have been worth only $52.80 on September 5, 1969 (B-57, 70), and there was a broad, sharp market decline in the prices of light-aircraft stocks after that, for which CCI was improperly compensated by the court of appeals.

REPLY TO CCI'S ARGUMENT

I. CCI Has No Cause of Action for Damages Under Rule 10b-6

CCI virtually concedes (Brief at 55-56) that it cannot maintain a damage action under Rule 10b-6 because it was neither a buyer nor a seller within the meaning of *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723 (1975). CCI pleads for an exception, on the ground that public policy forbade it from buying Piper shares, but this plea, already rejected by the "no exceptions" language in *Blue Chip Stamps*,* also deliberately avoids the point. The securities in distribution, whose purchasers were protected by Rule 10b-6, were not the Piper shares that CCI could not buy but the BPC securities offered in exchange. CCI never accepted the exchange offer.

---

that Chris-Craft could." (CCI Brief at 23) What either bidder could afford depended on its resources, not its Piper holdings, and one bidder willing and able to pay $1 more than the other would get every share. BPC had, of course, paid for its lead, including approximately $80 for each of the challenged shares. CCI's effort to excuse its voluntary withdrawal is directly refuted by both logic and the findings below.

* "We do not believe that such a shifting and highly fact-oriented disposition of the issue of who may bring a damages claim for violation of Rule 10b-5 is a satisfactory basis for a rule of liability imposed on the conduct of business transactions." 421 U.S. at 755.

CCI nowhere disputes (and the SEC expressly acknowledges, see p. 55, *infra*) the fact that the only purpose of Rule 10b-6 was to protect purchasers of the securities in distribution from abnormal market pressures on the price during distribution. As a competing offeror who neither purchased securities in distribution by BPC nor tendered Piper shares pursuant to BPC's exchange offer, CCI falls outside the class of persons that Section 10(b) and its rules were designed to protect, and suffered no harm they were intended to prevent.*

Little more need be said (see BPC's Brief at 34-36) about CCI's extraordinary attempt to avoid *Blue Chip Stamps* by asserting, in this Court for the first time, that BPC's purchases violated Section 14(e).** It is ironic that on the scienter issue, CCI shrugs off BPC's lack of intent to manipulate the market in any security and the finding that there was no manipulation in fact by contending that Rule 10b-6 is a "*per se* rule." (CCI Brief at 33) *Per se* rules have a singular need to be read with precision, and this Rule states that its own purpose is limited to the implementation of terms "as used in section 10(b)," a section enacted solely for the protection of purchasers and sellers. BPC's purchases did not violate any rule under Section 14(e), *per se* or otherwise, and since they were not manipulative in fact, they could not have violated the statute itself. *Cf. TSC Industries, Inc.* v. *Northway, Inc.*, 96 S. Ct. 2126, 2140 (1976).***

---

* CCI's claim that it was injured by its own obedience to Rule 10b-6, because it was thereby prevented from buying Piper shares, is belied by the facts. *See* p. 4, *supra*.

** The SEC's failure to mention this theory in the 32-page discussion of Rule 10b-6 in its amicus brief is eloquent.

*** Congressman Moss, cited by CCI (Brief at 57 n. **) as recognizing an "overlap between the Williams Act and Section 10(b)," actually said that passage of the Williams Act would neither approve nor disapprove "any suggested rules under Section 10(b). That Section stands on its own feet." 114 Cong. Rec. 21484 (1968).

[Footnote continued on page 12]

II. CCI Has No Cause of Action for Damages Under Section 14(e)

The question presented is whether Congress meant CCI, a takeover aspirant, to have a cause of action in that capacity for damages under Section 14(e). None is provided for in the statute, so the only question is whether a congressional inte .tion to create a cause of action in damages for a losing aspirant can be found.

CCI does not deign to discuss the lengthy analysis in *Cort* v. *Ash*, 422 U.S. 66 (1975), where this Court, only a year ago, carefully reexamined the principles governing the implication of private damage actions under federal statutes, and used examples from cases decided under the securities laws.* Instead of analysis, CCI throws up a snowstorm of irrelevant materials. But it cites virtually no authority of any kind for the proposition that persons other than the target company and its shareholders have implied rights to seek damages under

*** [Continued]

And the testimony that CCI cites (Brief at 57 n. **) as "specifically" mentioning Rule 10b-6 points in quite the opposite direction: the witness suggested that the SEC use Rule 10b-6 as an "analogy" in drafting a new rule under Section 14(e) that would prohibit purchases of the target company's shares by management (seeking to defeat a cash tender offer) or sales by a tender offeror (seeking to depress the price). *Hearings on S. 510 Before the Subcomm. on Securities of the Senate Comm. on Banking and Currency*, 90th Cong., 1st Sess. 131 (1967) (hereinafter cited as *Senate Hearings*). This testimony hardly suggests that the witness (much less Congress) thought either (a) that purchases of target stock by a tender offeror could be manipulative or (b) that Rule 10b-6 already covered the problem.

* CCI's only comment on *Cort* (CCI Brief at 55) is that it did not overrule *J.I. Case Co.* v. *Borak*, 377 U.S. 426 (1964), but counsel as competent as CCI's must know that this does not resolve the point in issue. In *Borak*, unlike this case, the plaintiff was within the "especial" class of persons the statute was plainly intended to protect, and the Court recognized a private cause of action in his favor; in *Cort*, the plaintiff was not a member of the especial class, and the Court rejected his right to sue. *See* BPC Brief at 39-40.

Section 14(e). The only two lower court cases in point—*Nicholson File* and *Klaus*—split on the standing issue. The case partly in CCI's favor *(Nicholson File)* states clearly that Congress was concerned with protecting target shareholders, not rival offerors, and that damages to a tender offeror should be denied if, as is true here, an award would subvert that purpose. Before turning to those cases * and the real issue, we take up CCI's groundless and irrelevant arguments.

A. *The Supposed Parallel with Section 14(a)*

CCI argues that a takeover aspirant must have an implied cause of action for damages under Section 14(e) because a company seeking to acquire a target by merger would have a cause of action under Section 14(a), the proxy provision. (CCI Brief at 40-42) The short answer to this argument is that its premise is false: although the question is not before the Court, there is no authority whatever for the proposition that merger suitors can sue in that capacity for damages under Section 14(a).

The only case CCI cites for the proposition that "rivals" have standing under Section 14(a) is *Union Pacific R.R.* v. *Chicago & N.W. Ry.*, 226 F. Supp. 400 (N.D. Ill. 1964), in which the only relief sought was an *injunction* mandating resolicitation of proxies and the so-called "rival" was one of several plaintiff stockholders of the target company, all of whom were afforded standing.**

---

* *See* pp. 19-21, *infra*.

** In what was at best an alternative holding, Judge Julius Hoffman said that since the plaintiff was also a party to the contract the shareholders were being asked to approve, it had a sufficient interest to have standing to request an injunction, particularly since it was joined by individual stockholder plaintiffs. 226 F. Supp. at 406. CCI's assertion that the *Union Pacific* case was "cited with approval" by this Court in *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375, 385 (1970), conceals the fact that the citation was for an unrelated point.

Nothing in the case remotely suggests that if, for example, proxy materials paint a misleadingly rosy picture of a proposed merger that is then consummated, a disappointed rival suitor can recover damages under Section 14(a), out of the pockets of the former target shareholders who are now shareholders of the merged company, on account of the rival's lost opportunity to pursue its competing merger proposal.

CCI's assertion (Brief at 40) that "management has standing" is false under both Section 14(a) and Section 14(e), and the cases CCI cites do not support it.* No case has ever held, under either section, that the directors and officers of a corporation can recover damages for injury to themselves—such as the loss of fees and salaries if they are denied their positions by a successful takeover. To the contrary, Section 14(a) and Section 14(e) were both designed to provide protection only to the stockholders whose proxies or tenders are at stake, and only they, or the target company on their behalf, can properly recover damages under either section.

* *Studebaker Corp.* v. *Gittlin*, 360 F.2d 692, 695 (2d Cir. 1966) and *General Time Corp.* v. *Talley Industries, Inc.*, 403 F.2d 159, 161 (2d Cir. 1968), *cert. denied*, 393 U.S. 1026 (1969), hold only that the target company may seek injunctive relief to protect the voting process, *not* that management can recover damages for injury to itself. *Greater Iowa Corp.* v. *McLendon*, 378 F.2d 783, 794 (8th Cir. 1967), also held simply that the target corporation itself had standing "to enforce compliance" with the proxy rules. Before reaching that point, the court held that neither the target company, nor directors, nor shareholder plaintiffs had standing under Sections 12 or 17(a) of the 1933 Act or Section 10(b) of the 1934 Act to complain that *other* shareholders were unlawfully solicited to join a voting trust, even though the plaintiffs were the persons injured. *See also Bound Brook Water Co.* v. *Jaffe*, 284 F. Supp. 702, 705 (D.N.J. 1968).

Thus, CCI's contention (Brief at 60) that failure to award a damage remedy to an offeror would "tip the balance" in favor of management is false, and, contrary to CCI's assertion (Brief at 60), BPC has never stated that management can sue for damages on its own behalf.

B. *The Legislative History of Section 14(e)*

CCI's contention that the legislative history reflects a "dual policy of protecting shareholders and rival contestants" (CCI Brief at 39) is without foundation. CCI has found nothing—*nothing at all*—in the Williams Act, the reports on it, the 1970 amendments to it, the reports on them, the statements of the sponsors of the legislation, or of any other member of Congress or the Executive Branch, or the statements of any representative of the SEC,* suggesting an intention to provide any private cause of action for damages under Section 14(e) at all, let alone a cause of action in favor of a competing offeror.

The only solicitude shown for tender offerors, in any of the legislative materials cited by CCI, is that the regulatory and disclosure *burden* imposed on them not be so great as to prevent tender offers or provide a weapon to entrenched management. CCI first quotes former Chairman Cohen's 1966 statement that the SEC agreed with the principle of the Canadian tender offer law that any regulations imposing a disclosure burden should not "unduly impede potential bidders." ** CCI

* What CCI calls "contemporaneous and consistent construction of a statute by the agency charged with its enforcement" (CCI Brief at 48-49), turns out to be three amicus briefs in cases decided after the Williams Act was passed, of which only the one in this case actually discussed the question whether an offeror has standing to seek damages under Section 14(e). That SEC lawyers *later* argue in court that Section 14(e) created a damage remedy is neither legislative history, *see, e.g., Regional Rail Reorganization Act Cases*, 419 U.S. 102, 132-133 (1974), nor expert agency interpretation. *Investment Co. Institute* v. *Camp*, 401 U.S. 617, 627-28 (1971).

** CCI Brief at 38, *quoting* Cohen, *A Note on Takeover Bids and Corporate Purchases of Stock*, 22 Bus. Law. 148, 152 (1966). The further citation of former Chairman Cohen (CCI Brief at 39) is actually to testimony that "The Commission's principal concern . . . is with these public shareholders." *Senate Hearings* at 205.

then quotes the Committee Reports' statement that the Williams Act avoided "tipping the balance of regulation" while requiring "full and fair disclosure for the benefit of investors." * Finally, CCI quotes this Court's statement in *Rondeau* that the Williams Act was not intended "to provide a weapon for management to discourage takeover bids . . . ." ** But none of the quotations (nor anything else in the legislative history) suggests any new right or remedy for tender offerors, and none of them was concerned with damage remedies or what classes of plaintiffs could seek them.

C. *CCI's Irrelevant Cases and Materials*

Several of CCI's supposed authorities suggested only that it would be appropriate to imply a private damage remedy in favor of the target company shareholders, the especial class whom the statute was designed to protect. This is the only point of the remarks of Professors Israels and Painter (cited, CCI Brief at 42).*** It is the only inference that could possibly be drawn from any "presumption" that Congress was aware of the *Borak* case. (CCI Brief at 42) It is the only relevance of *Sargent* v. *Genesco, Inc.*, 492 F.2d 750 (5th Cir. 1974) (cited, CCI Brief at 51), which held that *only* those target security holders "to whom the offer is addressed" have a damage action and that even holders of target com-

* CCI Brief at 39, *quoting* S.Rep. No. 550, 90th Cong., 1st Sess. 3 (1967); H.R.Rep. No. 1711, 90th Cong., 2d Sess. 4 (1968).

** CCI Brief at 39, *quoting* 422 U.S. at 58.

*** The written submissions of these two private witnesses are the only places in the legislative history where private remedies are even mentioned. No member of Congress ever asked about or acknowledged the quoted remarks. *Cf. Hochfelder*, 96 S.Ct. at 1386 n. 24. *See also* pp. 57-59, *infra*.

pany securities of a different class may not sue. *Id.* at 769.*

Apart from its comments in *Rondeau*, 422 U.S. at 60, this Court has not considered the question whether Congress intended that even target shareholders may seek damages under Section 14(e). But this case presents the much easier question whether Congress intended that a competing offeror may obtain damages in that capacity, particularly at the expense of members of the protected class who exchanged their shares for securities of the company being sued. The answer to that question, under *Cort*, is plainly no.

CCI also cites two cases holding only that the target company has a sufficient interest (including protection of its shareholders, the basic statutory objective) to seek injunctive relief under Section 14(e) to "enforce duties

---

* A great many of CCI's citations have to do only with the special "*Birnbaum*" problem of the nontendering shareholder, which has nothing to do with this case. CCI (as noted in BPC's Brief at 45) did not sue as a tendering or nontendering shareholder for damages in either capacity. Nontendering shareholders of the target company cannot sue under Rule 10b-5 because they are not purchasers or sellers. Judge Friendly has suggested that Section 14(e), by eliminating the "purchase or sale" language, extended protection to all target shareholders. That is the point of the language CCI quotes (CCI Brief at 47) from *Electronic Specialty Co.* v. *International Controls Corp.*, 409 F.2d 937, 940-41 (2d Cir. 1969). It is the only point of *Smallwood* v. *Pearl Brewing Co.*, 489 F.2d 579, 596 n.20 (5th Cir.), *cert. denied*, 419 U.S. 873 (1974) (cited, CCI Brief at 51), which merely upheld the standing of a nontendering shareholder. And it is the only apparent relevance of *Dyer* v. *Eastern Trust & Banking Co.*, 336 F. Supp. 890 (D. Me. 1971) (cited CCI Brief at 52-53), which held only that a shareholder of an offeror could sue his own company. It is also the only relevance of the following materials, none of which even *mentions* suits by offerors: Kennedy, *Tender Moment*, 23 Bus. Law. 1091, 1114 (1968) (cited, CCI Brief at 44, again at 46, again at 53); Krasik, *Tender Offers: The Target Company's Duty of Disclosure*, 25 Bus. Law. 455, 458 (1969) (cited, CCI Brief at 45, again at 53-54); R. Jennings & H. Marsh, *Securities Regulation: Cases and Materials* 937 (3d ed. 1972) (cited, CCI Brief at 53).

created by statute" and thus help "accomplish the purposes of the legislature." *Electronic Specialty Co.* v. *International Controls Corp.*, 409 F.2d 937, 946 (2d Cir. 1969); *see Butler Aviation International, Inc.* v. *Comprehensive Designers, Inc.*, 425 F.2d 842, 843 n.1 (2d Cir. 1970).* But permitting the target company or persons not within the protected class to seek injunctive relief to enforce the disclosure policy articulated by Congress does not raise the same policy issue as would permitting damage actions by such persons, because "100 injunctions are no more effective than one," *Hawaii* v. *Standard Oil Co.*, 405 U.S. 251, 261 (1972), and a private injunction has the same purpose and effect as an SEC injunction. Here, the question is whether there is *any* congressional policy of providing monetary redress for injuries alleged by offerors and others outside the protected class, particularly out of the pockets of some of the target shareholders. Neither *Electronic Speciality* nor *Butler* suggested that management, let alone an offeror, could recover damages for an injury suffered in that capacity.**

---

* The three lower court "precedents under Section 13(d) of the Williams Act," cited by CCI (Brief at 53) as analogous to its position here, support only injunctive relief to compel compliance with the terms of the statute and are carefully limited to that relief. *See GAF Corp.* v. *Milstein*, 453 F.2d 709 (2d Cir. 1971), *cert. denied*, 406 U.S. 910 (1972); *Alaska Interstate Co.* v. *McMillian*, 402 F. Supp. 532 (D. Del. 1975); *Jewelcor Inc.* v. *Pearlman*, 397 F. Supp. 221 (S.D.N.Y. 1975).

Several of the articles cited by CCI also mention nothing more than injunctive actions by the target company. *See* Hamilton, *Some Reflections on Cash Tender Offer Legislation*, 15 N.Y.L.F. 269, 291-92 (1969); Young, *Judicial Enforcement of the Williams Amendments: The Need To Separate the Questions of Violation and Relief*, 27 Bus. Law. 391, 398-99 & n.30 (1972); Note, *Current Problems Under the Securities Acts—The Expanding Uses of Rule 10b-5*, 10 B.C. Ind. & Com. L. Rev. 313, 333-34 (1969).

** The other two members of what CCI likes to call the "*Crane-Electronic Specialty-Iroquois-Butler* quartet" are Rule 10b-5 cases irrelevant here. In *Crane Co.* v. *Westinghouse Air Brake Co.*, 419 F.2d 787 (2d Cir. 1969), *cert. denied*, 400 U.S. 822 (1970), the

D. *The* Nicholson File *and* Klaus *Cases*

In sum, despite CCI's bold declaration (Brief at 49) that Congress "did not reject these precedents on standing" when it amended the Williams Act in December 1970, CCI has found *no* precedents for the proposition that anyone other than a target shareholder could sue for damages under Section 14(e).* Since that time, apart from the present case, exactly one partial precedent

---

court granted a tender offeror a damage action under Rule 10b-5 under a "forced seller" exception to the *Birnbaum* rule. In *Iroquois Industries, Inc.* v. *Syracuse China Corp.*, 417 F.2d 963 (2d Cir. 1969), *cert. denied*, 399 U.S. 909 (1970), the court denied a tender offeror standing to sue for damages under Rule 10b-5. In both cases, the Second Circuit speculated that Section 14(e) *might* afford standing in future cases, but the question was not involved in either case.

Almost all of the secondary materials cited by CCI that mention suits by offerors suggest no more than injunctive relief to enforce congressional policy, not damages in favor of the offeror. 1 A. Bromberg, *Securities Laws, Fraud: SEC Rule 10b-5* (1975), says, "[T]here is nothing in the legislative history [of Section 14(e)] to show that Congress was particularly concerned to protect the offeror." *Id.* at § 6.3(1040). Note, *The Williams Amendments: An Evaluation of the Early Returns*, 23 Vand. L. Rev. 700 (1970), says the "difficulties involved appear to preclude the award of damages as an appropriate remedy." *Id.* at 722. *See also* Binder, *The Securities Law of Contested Tender Offers*, 18 N.Y.L.F. 569, 627-30 (1973); Bromberg, *The Securities Law of Tender Offers*, 15 N.Y.L.F. 462, 554-55 (1969); Mundheim, *Tender Offers*, 2 Rev. of Sec. Reg. 953, 956 (1969); *Takeover Bids (Proceedings of Meeting Held in Lloyd's Writing Room, London on Tuesday, 20 July, 1971)*, 27 Bus. Law. 243, 250 (1971); Swanson, *S. 510 and the Regulation of Cash Tender Offers: Distinguishing St. George from the Dragon*, 5 Harv. J. Legis. 431, 444 (1968); Note, *Cash Tender Offers*, 83 Harv. L. Rev. 377, 398-99 (1969).

* Of the 25 books and articles cited by CCI on the implied cause of action issue, only one published before *Chris-Craft II* suggested without qualification that offerors could recover damages under the Williams Act; and even that article (not mentioned on this point in the legislative history) made only a casual reference to the question. *See* Fleischer & Mundheim, *Corporate Acquisition by Tender Offer*, 115 U. Pa. L. Rev. 317, 363 n.183 (1967).

has appeared, along with one square holding to the contrary.

In *H. K. Porter Co.* v. *Nicholson File Co.*, 482 F.2d 421 (1st Cir. 1973), the court affirmed the denial of a motion to dismiss a tender offeror's complaint for damages against the target company. But the court went on to recognize, in a way that would require reversal here, that the target company shareholders are the "overriding" beneficiaries of the Section and that any damage award must bear that in mind:

> It follows, however from the overriding investor-protection purpose of § 14(e) that damages should be denied to a tender offeror to the extent that they are inconsistent with that purpose. The statute, in other words, may not be diverted from one designed to assist the investor to one operated principally to benefit one or another of the rival management or control groups jockeying for power.
>
> . . .
>
> In the event Porter [the offeror] establishes a violation of § 14(e), the district court should make findings of the probable impact of recovery from Nicholson on its shareholders. Any recovery in damages from the corporation must be consistent with the primary congressional aim of protecting investors, and the district court would be warranted in denying damages, otherwise established, if it should conclude that to award them would be to subvert that purpose. *Id.* at 424-25.

The same considerations apply here, where a tender offeror seeks damages against a competing offeror (BPC), and a judgment would injure the target company share-

holders who accepted BPC securities under its exchange offer.*

Moreover, the court in *Nicholson File* did not have the benefit of this Court's later rulings in *Rondeau* and *Cort*, reaffirming that standing to seek damages must be limited to the intended beneficiaries of a statute and to wrongs "redressable under its provisions." The Ninth Circuit did have those cases before it when it decided *Klaus* v. *Hi-Shear Corp.*, 528 F.2d 225 (9th Cir. 1975). In *Klaus*, the Ninth Circuit, citing this Court's decision in *Rondeau*, ruled that injuries to tender offerors like CCI are not remediable under Section 14(e) because that Section "was designed to protect . . . offerees, not offerors." *Id.* at 232. CCI seeks to dismiss this holding by asserting that plaintiff Klaus, the tender offeror, "was denied a preliminary injunction because of lack of a showing of irreparable injury." (CCI Brief at 54 n. *) But this misses the point. Klaus had shown irreparable harm to *himself*. What he had failed to show was "any harm to the *cash tender offerees* . . . that could not be compensated by money damages [to them]." 528 F.2d at 232 (emphasis added). In light of *Rondeau*, the Ninth Circuit held that while a tender offeror might in a proper case have standing to seek an injunction to prevent irreparable harm *to target shareholders*, it is harm to the shareholders alone that is redressable under Section 14(e). The necessary corollary is that a tender offeror cannot sue under Section 14(e) for damages it suffers in that capacity.

E. *Policy Considerations*

CCI would find, in the very silence of the statute and its legislative history on the subject, a congressional intent to create new private damage actions in favor of "all participants" in tender offer contests against all other

* *See also* E. Aranow & H. Einhorn, *Tender Offers For Corporate Control* 297-98 (1973).

participants.* (CCI Brief at 36) To support this view, CCI resurrects the public policy of unlimited "vigorous enforcement" relied on by the court of appeals but rejected by this Court in *Blue Chip Stamps*, 421 U.S. at 748-49.

The real "public policy" question here is whether, in implying remedies not expressly provided, the federal courts should go beyond enforcing the statutory policy actually declared by Congress (protecting target shareholders) and find a congressional intent to create new federal causes of action in favor of "all participants"— actions that could take money away from some of the supposedly deceived shareholders Congress wanted to protect and award it to a competing tender offeror who unsuccessfully sought their shares. We submit that federal courts should not create a new federal cause of action for damages unless they have a clear basis for inferring that Congress intended to provide *this* means of redress, to *this* particular class of plaintiffs, for *this* particular harm. That is the plain holding of *Cort*, and it is fully supported by a proper view of the relationship between Congress and the federal courts on statutory issues.

Congress knows how to provide for private damage remedies for violation of a federal statute. It does not always choose to do so. Sometimes Congress provides only for private injunctive actions.** When Congress

---

* That is, of course, the opposite of the usual inference. *See T.I.M.E., Inc.* v. *United States*, 359 U.S. 464 (1959), holding that although the Motor Carrier Act prohibits carriers from making "unjust and unreasonable charge[s]," provisions for shippers to collect damages were "conspicuously absent," *id.* at 470, and no damage remedy was available.

** For example, Section 505(a) of the Water Pollution Control Act, as amended, 33 U.S.C. §§ 1251, 1365(a) (Supp. V, 1975), expressly authorizes individuals to sue violators to enforce compliance with effluent standards, but it does not provide for damage suits, as

provides expressly for private damage remedies at all, it defines and limits them with a precision that is highly relevant here, and it indicates the class of plaintiffs who can sue, the injuries that will be redressable, the elements of the plaintiff's case, the standard of blameworthiness, the defenses available to avoid liability, the procedural protections to which the parties are entitled, and the measure of damages. Section 11 of the 1933 Act is an apt example. But we need not rely solely on the carefully defined limitations on the battery of express private remedies contained in the securities laws. *See generally Hochfelder*, 96 S. Ct. at 1388-89. For the clear congressional policy against providing a federal damage action to every private person injured by a violation of federal law is abundantly illustrated in other areas as well.*

---

to which injured persons are expressly left to such remedies as may be available at common law or under other statutes. *See* S. Rep. No. 414, 92d Cong., 1st Sess. 81 (1971). The Act provides for civil penalties, but these are payable to the United States and would "not be recovered by the complainant." H.R. Rep. No. 911, 92d Cong., 2d Sess. 133 (1972). Section 20(a) of the proposed Toxic Substances Act (S. 3149, now in conference after passage by both Houses) similarly provides for private suits "to restrain such violation" but, despite the obvious possibility of tangible harm to individuals, it gives them no damage remedy. *See* 122 Cong. Rec. H8860 (daily ed. Aug. 23, 1976).

* For example, the Federal Trade Commission Improvement Act, Pub. L. No. 93-637, 88 Stat. 2183 (1975), provides a damage action for any consumer injured by a violation of the statute, *id.* § 110(d), 88 Stat. 2189, but expressly prohibits recovery of any damages for personal injury. *Id.* § 111(b)(2), 88 Stat. 2192. The Consumer Product Safety Act, 15 U.S.C. § 2051 *et seq.* (Supp. V, 1975), provides that "any interested person" may obtain an injunction to enforce product safety rules, *id.* § 2073, but that individuals injured by violation of a rule may recover damages only for "knowing (including willful)" violations, because Congress was careful to include a higher scienter requirement in the damage section. *Id.* § 2072.

The federal courts have been properly scrupulous to observe this congressional policy of carefully limiting private damage remedies when they are called upon to decide whether a damage remedy not expressly provided should nevertheless be implied. For example, because Congress provided only for federal enforcement and rejected a proposed provision for private damage actions, the courts have uniformly held that there is no private federal damage action for violations of the Food, Drug, & Cosmetic Act, 21 U.S.C. § 301 *et seq.* (1970).* Likewise, although the Lanham Act, 15 U.S.C. § 1051 *et seq.* (1970), provides for civil liability against any person who affixes "any false description or representation" upon a product on behalf of any person who is "damaged by the use of any such false description or representation," *id.* § 1125(a), the Second Circuit held on the basis of the general policy set forth in the statute and its legislative history that "any person" means only a trade competitor, not a consumer.**

Cort, *Rigsby*, and *Blue Chip Stamps* confirmed the policy that these lower court cases have applied. They reflect this Court's sound view that the only satisfactory substitute for express statutory guidance is a clear basis for inferring a congressional intention that a particular class of plaintiffs should have redress in damages for a particular type of injury.

---

* *See Florida* ex rel. *Broward County* v. *Eli Lilly & Co.*, 329 F. Supp. 364 (S.D. Fla. 1971); *Clairol Inc.* v. *Suburban Cosmetics & Beauty Supply, Inc.*, 278 F. Supp. 859 (N.D. Ill. 1968); *Wells* v. *Wells*, 240 F. Supp. 282 (W.D. Ky. 1965).

** *Colligan* v. *Activities Club of New York, Ltd.*, 422 F.2d 686, 694 (2d Cir. 1971) ("had Congress contemplated so revolutionary a departure [as is] implicit in appellants' claims, its intention could and would have been clearly expressed").

There is, of course, a method in all of these careful distinctions that CCI would treat as madness. It was well expressed by Judge Leventhal:

> Judicial implication of ancillary Federal remedies is a matter to be treated with care, lest a carefully erected legislative scheme—often the result of a delicate balance of Federal and state, public and private interests—be skewed by the courts, albeit inadvertently.*

While "vigorous enforcement" of federal law through private damage actions by all affected persons may be a plausible public policy in some situations, it is not the only public policy for all situations. When a court creates an implied cause of action for damages in favor of a person who is not plainly within the "especial class" Congress intended to protect, it steps into a policy-making role that it is ill-equipped to fill.

Important policy issues, best resolved by Congress, are involved in deciding whether to create a new damage action and what its scope should be. In the situation presented by this case, those issues include (1) whether allowing damages to others than target shareholders suing in that capacity would open the door to a host of other claims, such as suits by displaced directors and management for lost fees and salaries; (2) the impact on innocent shareholders who accept an exchange offer of permitting suits by a competing offeror for unlimited damages against the company whose securities the innocent shareholders accept; (3) what the standard of blameworthiness and the measures of damages should be; (4) whether the inevitable deterrence of tender offers that arises when potential

---

* *Holloway* v. *Bristol-Myers Corp.*, 485 F.2d 968, 989 (D.C. Cir. 1973) (private parties have no standing to enforce provisions of the Federal Trade Commission Act, 15 U.S.C. §§ 45, 52, 54 (1970)).

damage liability is expanded outweighs the benefits to shareholders that tender offers bring; (5) the supposed need for damage actions by tender offerors as a supplement to the expert agency's enforcement efforts—particularly in a case where the agency has itself obtained relief for the protected class; (6) the impact of increasing the workload of the federal courts; and (7) the significance in the federal system of duplicating or displacing state law.

In our Brief we cited the Clayton Act, 15 U.S.C. § 12 *et seq.* (1970), and *Hawaii* v. *Standard Oil Co.*, 405 U.S. 251 (1972), to illustrate the caution with which Congress and this Court approach issues like those presented here. CCI tries to dismiss *Hawaii* on the ground that in the Clayton Act Congress itself expressly limited those it allowed to sue for damages to a narrower group than those it allowed to sue for injunctions, but "Congress made no such distinction in the securities statutes." (CCI Brief at 59 n.†) That daring assertion comes surprisingly close to the heart of the issue here, but CCI has the argument backwards. Congress was utterly silent about who, if anyone, could have a private remedy for a violation of the Williams Act, and it had no occasion to decide whether, if there were to be a private remedy, the class permitted to seek injunctions to enforce the law would be broader than the class of persons permitted to sue for damages for injury to themselves.

Hawaii illustrates that when Congress has faced this issue expressly,* it has allowed a much wider class to seek injunctions, while at the same time carefully limiting the type of harm redressable in damages and defining the class of damage plaintiffs more narrowly than all those

---

* The Consumer Product Safety Act is another example. See p. 23 n. **, *supra*.

consequentially damaged in fact.* *Rigsby*, *Cort*, and *Blue Chip Stamps* teach that when Congress has not created and defined an express private damage remedy, federal courts must be careful to imply such a remedy, if at all, only in favor of persons who are within the "especial class" the statute was intended to protect and who have suffered the harm for which the statute was intended to provide redress.

CCI disregards both classes of precedent. Instead, it offers the remarkable argument that because Congress gave no indication that it intended any private damage action at all under Section 14(e), this Court should not only infer that Congress intended one, but should also infer that, by its failure to state any express limitations on the action it did not expressly create, Congress intended that there be no limitations whatsoever on those who could bring such an action.

III. BPC Did Not Act With Scienter

CCI's only real attempt to answer BPC's scienter arguments is to stretch the facts of this case beyond recognition.**

A. *Rule 10b-6*

CCI does not even answer the argument that since *Hochfelder* required proof of "intent to deceive, manipulate, or defraud" to support a damage action under Section 10(b), such intent must obviously be shown to support a damage action under Rule 10b-6. Nor does CCI respond to the fact that the courts below found no in-

---

* As this Court observed in *Hawaii*, "[t]he lower courts have been virtually unanimous in concluding that Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation." 405 U.S. at 262-63 n. 14. *See, e.g.*, *Billy Baxter, Inc.* v. *Coca Cola Co.*, 431 F.2d 183 (2d Cir. 1970), *cert. denied*, 401 U.S. 923 (1971).

** The SEC does not urge affirmance of the decision below on the scienter issue. *See* pp. 64-66, *infra*.

tent to deceive or manipulate and no deception or manipulation in fact. Instead, CCI repeatedly asserts that the admittedly "technical" violation (A-149) was made in disregard of warnings by the SEC and counsel. But apart from being insufficient to establish intent to manipulate, this assertion is wrong in fact: BPC acted in good faith reliance on the opinion of its counsel that the comment introducing *proposed* Rule 10b-13 was an incorrect reading of Rule 10b-6 and that Rule 10b-6 did not apply to purchases of target company stock. *See* pp. 3-6, *supra*. Neither this advice nor BPC's reliance on it was reckless. Indeed, the district court (Judge Tenney) (C-45) and the Chief Judge of the Second Circuit (C-28-31) shared the opinion of BPC's counsel.

B. *Section 14(e)*

This case presents the following scienter question: is mere awareness of circumstances that were omitted from an exchange offer prospectus because of a considered judgment that they were not material, but that were later found material by the court, equivalent to the scienter needed to support an action for damages, despite a finding, affirmed on appeal, that there was no intent to mislead and no bad faith? This Court, in *Hochfelder*, has already spoken to that issue under Section 10(b): intent to mislead is required. CCI tries to avoid the plain consequences of this holding, first by trying to reargue the facts, then by trying to turn this into a recklessness case, then by trying to rewrite *Hochfelder*, and finally by trying to draw a distinction as to the need to prove scienter (not perceived by the courts below or any other court) between Section 10(b) and Section 14(e).

1. CCI's Effort To Reargue the Facts

CCI tries to make it appear that the lower courts found something more than mere awareness of circum-

stances that no expert thought were material at the time but were later found material by the court. CCI repeatedly accuses BPC of "concealing [a] $13 million BAR loss." (CCI Brief at 64; *see, e.g., id.* at 35) But there was no "BAR loss" to report, and the courts below rejected CCI's charge of concealment. As Judge Timbers said, "The district courts' findings of fact, supported by substantial evidence, do not warrant the conclusions that BPC's officers had decided to sell the BAR before the exchange offer became effective and had postponed consummation in order to avoid disclosure." (A-47; *see* A-97-98; D-11-13)

BPC was held liable not for concealing a loss incurred or anticipated but for a failure to make an updating comment on a still-correct balance sheet entry. The critical item, note 1 to the financial statements in BPC's prospectus, merely explained that BPC's carrying value for the BAR was $11 million *less* than BPC's equity in the underlying BAR assets because of a 1965 "market price evaluation" of $18.4 million. (EV 99) There was no representation that this figure had any relationship to, much less that it equalled, the BAR's 1969 market value. BPC, with the concurrence of its independent auditors, applied to this special situation the normal rule that a balance sheet carrying value is only adjusted when there is a transaction or other definitive event establishing a new figure.

Although it ruled that BPC should have made an updating comment (not a writedown), the district court found that BPC had acted in good faith and without any intent to deceive anyone: "I find that Bangor Punta did not intentionally or purposefully mislead Piper Aircraft stockholders or the public or investors by the omission to make disclosure of the sale under consideration. . . ." (D-14; *see also* A-148) The court of appeals agreed with the district court that BPC had "no intent to mislead"

in failing to disclose the negotiations (A-118), and expressly affirmed that court's finding that there had been no "bad faith" on BPC's part. (A-47; *see also* A-37)

The court of appeals' judgment rested on its holding, squarely in conflict with this Court's subsequent decision in *Hochfelder*, that

> intent to defraud is not an indispensable element in a private action for damages under the antifraud provisions of the federal securities laws. (A-47)

The court then clearly articulated a "mere awareness" standard of liability:

> In sum, and put as simply as possible, the standard for determining liability under § 14(e) . . . is whether plaintiff has established that defendant *either* (1) knew the material facts that were misstated or omitted, *or* (2) failed or refused to ascertain such facts when they were available to him or could have been discovered by him with reasonable effort. (A-36-37) (Timbers, J.) (emphasis added)
>
> * * *
>
> [T]he law was aimed at misrepresentations or omissions involving *some degree of awareness* . . . . (A-105) (Mansfield, J., concurring) (emphasis in original)
>
> * * *
>
> [T]he *scienter* requirement would be satisfied upon a showing that the person charged knew the material facts misstated or omitted and could reasonably have been expected to appreciate their significance, . . . *or*, if he did not know them, that he had reasonable cause to believe that there might be a material failure in disclosure and yet did not ascertain and disclose the facts even though he could have done so

> without any undue effort. . . . (A-105-06) (Mansfield, J., concurring) (emphasis added)

Later courts struggling with this language, including the Second Circuit itself, have characterized *Chris-Craft II* as invoking "a negligence standard," *White* v. *Abrams*, 495 F.2d 724, 732 (9th Cir. 1974), and as entailing "virtually absolute liability" for every corporation. *Gerstle* v. *Gamble-Skogmo, Inc.*, 478 F.2d 1281, 1301 n.20 (2d Cir. 1973).

CCI simply ignores the court of appeals' formulation of the scienter standard, and attempts instead to suggest that the court found something called "knowledge of falsity." (CCI Brief at 66-67) But this is a mere play on words. The district court found and the court of appeals agreed that BPC had no intent to deceive; liability was premised on "mere awareness" of information later deemed material. In none of CCI's "knowledge of falsity" cases was a defendant held liable without the crucial element that was required by *Hochfelder* and is missing here: proof that the defendant intended to deceive the shareholders.*

2. CCI's Recklessness Theory

CCI alternatively contends (Brief at 68) that BPC was guilty of "recklessness," a term for which it offers no definition, in failing to disclose its BAR negotiations. But this simply is not a recklessness case. There were findings of no intent to deceive or bad faith. There was

---

* CCI says (Brief at 74) that "Bangor was described [by the court] as making representations of value known to be 'deceptive and unrealistic' . . . ." What Judge Timbers actually said was that BPC acted "unreasonabl[y]" in not recognizing the significance of "circumstances that indicated that the book value of the BAR was deceptive and unrealistic." (A-48) The difference between the court's language, which sets forth essentially a negligence standard, and CCI's construction of that language is the very reason why *Hochfelder* requires this case to be reversed.

no allegation of recklessness in CCI's complaint, the case was not tried on a recklessness theory, and neither the district court nor the court of appeals found recklessness. Judge Timbers used the word "reckless" in discussing whether the BAR omission was within the discretion allowed to the authors of a prospectus (A-48), but this pre-*Hochfelder* use of the word was plainly not intended to suggest recklessness amounting to bad faith, because Judge Timbers had just agreed that the finding of an absence of bad faith was supported by the evidence. (A-47) In any event, Judge Mansfield explicitly rejected Judge Timbers' adjectives (A-117-122), and Judge Gurfein—writing for the court over Judge Timbers' dissent on the SEC injunction issue—affirmed the district court's denial of an injunction to the SEC even while noting that "sustained recklessness can be the basis for injunctive relief." * (A-99)

Hochfelder, of course, leaves open the question whether recklessness is ever a sufficient basis for imposing liability under the antifraud provisions of the securities laws. We argued in our Brief that it was not enough, under *Hochfelder's* rationale, except in a limited evidentiary sense. CCI scoffs at this (Brief at 69 n. *), but cites many cases illustrating that recklessness is nothing more than a verbal formulation that allows the trier of fact to infer from circumstantial evidence that the defendant intentionally violated the law.** That concept and

* The word "reckless" occasionally appears elsewhere in the court of appeals' opinions. Judge Timbers, dissenting in the SEC case, repeated his characterization (A-80 n.37); the points made in the text prevent any reliance by CCI on that footnote. In each other instance the word is used merely as part of a general discussion of different sorts of scienter, and plainly is not a characterization of the conduct involved in this case, as to which the "mere awareness" standard was expressly applied.

** *See, e.g., United States* v. *Natelli,* 527 F.2d 311, 322-23 & n. 9 (2d Cir. 1975), *cert. denied,* 96 S.Ct. 1663 (1976); *United States* v. *Brawer,* 482 F.2d 117, 128-29 (2d Cir. 1973); *United States* v.

the cases CCI cites are irrelevant here, because there was a finding of the district court, affirmed on appeal, that BPC did not act in bad faith or with intent to mislead.

In any event, *Hochfelder* itself makes it clear (*see* pp. 35-37, *infra*) that even if recklessness could ever be the sole basis for liability, the situation would have to involve conduct of such a high degree of blameworthiness that it is "tantamount to fraud." *United States* v. *Mackay*, 491 F.2d 616, 623 (10th Cir. 1973), *cert. denied*, 416 U.S. 972 (1974).* Dean Prosser explains that "recklessness" means

> that the actor has intentionally done an act of an unreasonable character in disregard of a risk known to him or so obvious that he must be taken to have been aware of it, and so great as to make it highly probable that harm would follow. It usually is accompanied by a conscious indifference to the consequences, amounting almost to willingness that they shall follow; and it has been said that this is indispensable. Since, however, it is almost never admitted, and can be proved only by the conduct and the circumstances, an objective standard must of necessity in practice be applied. W. Prosser, *Law of Torts* 186 (4th ed. 1971) (footnotes omitted).

This Court has taken the same approach in the First Amendment libel cases concerning public figures, holding in *St. Amant* v. *Thompson*, 390 U.S. 727, 731 (1968), that to find "reckless conduct" it is not sufficient to show

---

Henderson, 446 F.2d 960, 966 (8th Cir. 1971); *Elbel* v. *United States*, 364 F.2d 127, 134 (10th Cir. 1966), *cert. denied*, 385 U.S. 1014 (1967). *Cf. United States* v. *Mackay*, 491 F.2d 616, 622-23 (10th Cir. 1973), *cert. denied*, 416 U.S. 972 (1974); *United States* v. *Simon*, 435 F.2d 796, 808-09 (2d Cir. 1969), *cert. denied*, 397 U.S. 1006 (1970). *See generally Ultramares Corp.* v. *Touche*, 255 N.Y. 170, 190-91, 174 N.E. 441, 449 (1931) (Cardozo, J.).

* *See Coleco Industries, Inc.* v. *Berman*, Civ. No. 73-2790, slip opinion text at n.32 (E.D. Pa. Aug. 9, 1976) (*Hochfelder* requires intent to deceive or conduct "so reckless as to be virtually indistinguishable in its culpability from deliberate fraud").

that a reasonable man would have investigated further before publishing. There must be such reckless disregard for truth or falsity as to demonstrate "actual malice."

This plainly is not that case.* The record clearly indicates that the BAR negotiations were fully discussed with BPC's outside counsel, First Boston, and its outside counsel at a "due diligence" meeting in connection with the preparation of the exchange offer prospectus,** and with BPC's independent auditors. (App. 1656A-57A, 1759A-61A, EV 87) The information omitted did not affect the value of the securities being offered, which was found to be $80 per Piper share as promised (A-140), and did not affect the value of the common stock, which went up in price after the sale of the BAR was reported. (App. 591A) The district court not only found no "intent to defraud" but no "bad faith" or "improper purpose," and these findings were affirmed on appeal. (A-47; D-14) The BAR omission, said the district court, involved nothing more than a "mere negligent omission or mis-

* A leading example of recklessness is the lawyer who, while pleading ignorance, has tried to "escape liability for fraud by closing his eyes to what he saw and could readily understand." *SEC* v. *Frank*, 388 F.2d 486, 489 (2d Cir. 1968). Judge Adams read *Frank* as (to quote CCI, Brief at 67 n. *) "strongly suggest[ing] that 'recklessness would be tantamount to willful fraud, from which intent could be inferred.'" *Kohn* v. *American Metal Climax, Inc.*, 458 F.2d 255, 281 (3d Cir.), *cert. denied*, 409 U.S. 874 (1972). *See also Hertz Corp.* v. *Cox*, 430 F.2d 1365, 1374 (5th Cir. 1970) (fraud under Georgia law requires showing "that such representation was wilfully and knowingly false, and what the law regards as the equivalent of knowledge, a reckless or fraudulent representation about that which the party pretends to know, but about which he knows that he does not know, and by which false pretense *his purpose and intent is to deceive*") (emphasis in original partially omitted).

** It is simply false to imply (CCI Brief at 77) that First Boston's counsel was not involved in the decision not to disclose the BAR negotiations. *See* App. 1657A-61A. Indeed, *all* the facts on which the district court found the BAR violation were obtained from BPC's corporate minutes (D-5-12), which hardly suggests a concealment motive.

statement of fact." (A-148) And the court of appeals affirmed the denial of an injunction against future securities laws violations sought by the SEC, over Judge Timbers' dissent, despite the view of both Judge Gurfein and Judge Mansfield that recklessness would have been sufficient to support an injunction. (A-99, 122-23)

CCI seeks to dismiss the extent of consultation between BPC and its professional advisers, all of whom were widely experienced in the securities field, as a "scienter round-robin." (CCI Brief at 76) But even apart from the fact that no one has ever questioned the good faith of the lawyers and accountants, CCI's cliche entirely misses the point. The question here is whether BPC and First Boston can possibly be said to have been reckless in the sense left open by *Hochfelder*, and it is highly relevant that they consulted each other and each other's experts. During the summer of 1969 there had been no decision by BPC's directors to sell the BAR. The decision whether to speculate about a future disposition of stock or assets (which would be quite different transactions, *see* D-12) and, if so, what to say, was a complex one. BPC's consultation in good faith with First Boston and numerous professional advisers makes a finding of recklessness inconceivable under these circumstances. *See SEC* v. *Harwyn Industries Corp.*, 326 F. Supp. 943, 955-57 (S.D.N.Y. 1971); *cf. Linden* v. *United States*, 254 F.2d 560, 568 (4th Cir. 1958); *Kountze* v. *Kennedy*, 147 N.Y. 124, 41 N.E. 414, 415 (1895).

3. CCI's Effort To Rewrite *Hochfelder*

CCI tries to dismiss *Hochfelder* as holding only that an accountant cannot be held liable for failing to uncover a client's unusual procedure for handling correspondence. (CCI Brief at 63) But CCI belittles this Court to suggest that it granted certiorari in *Hochfelder* to announce that accountants need not read their clients' mail. This

Court took *Hochfelder* to resolve a longstanding conflict among the circuits over the degree of fault required for liability under Section 10(b). The Court ruled that Section 10(b) proscribes conduct "quite different from negligence," 96 S. Ct. at 1384, and that "it connotes intentional or willful conduct designed to deceive or defraud investors. . . ." *Id.* That ruling is not limited to the handling of mail or to the liability of auditors.

In *Hochfelder* this Court very carefully defined what it meant by the term scienter as a prerequisite for liability under the securities laws—"intent to deceive, manipulate, or defraud." * Unhappy with this definition because BPC could not be held liable under it, CCI seeks to substitute a looser definition by arguing that the "antecedents" of *Hochfelder* are consistent with the court of appeals opinion in *Chris-Craft II.* That claim—which rests on isolated quotations—seriously distorts the facts and holdings of those cases. In fact, in each case CCI cites (Brief at 66-67) the court either found the defendants not liable despite awareness similar to that possessed by BPC here,** or found defendants liable be-

---

* This Court reiterated this formulation throughout its opinion: "We granted certiorari to resolve the question whether a private cause of action for damages will lie under § 10(b) and Rule 10b-5 in the absence of any allegation of 'scienter'—intent to deceive, manipulate, or defraud . . . . We conclude that it will not . . . ." 96 S. Ct. at 1381 (footnote omitted). *See also id.* at 1381 n.12 ("In this opinion the term 'scienter' refers to a mental state embracing intent to deceive, manipulate, or defraud"); *id.* at 1383 (language of the statute "strongly suggest[s] that § 10(b) was intended to proscribe knowing or intentional misconduct").

** *Lanza* v. *Drexel & Co.*, 479 F.2d 1277 (2d Cir. 1973); *Smallwood* v. *Pearl Brewing Co.*, 489 F.2d 579 (5th Cir.), *cert. denied,* 419 U.S. 873 (1974); *cf. Kohn* v. *American Metal Climax, Inc.*, 458 F.2d 255, 291-301 (3d Cir.) (Adams, J., dissenting), *cert. denied,* 409 U.S. 874 (1972).

SEC v. *Texas Gulf Sulphur Co.*, 401 F.2d 833, 868 (2d Cir. 1968), *cert. denied sub nom. Coates* v. *SEC,* 394 U.S. 976 (1969), and *Gerstle* v. *Gamble-Skogmo, Inc.*, 478 F.2d 1281, 1299 (2d Cir. 1973),

cause they had intentionally misled the plaintiffs.* CCI simply disregards the fact that two of the cases criticized by this Court in *Hochfelder*, 96 S. Ct. at 1381 n.12, on the ground that they set too low a standard of scienter, would have imposed liability on the same basis used by the court of appeals here: failure to disclose information known to the defendant and later found material, but without proof of intent to mislead. *Myzel* v. *Fields*, 386 F.2d 718, 735 (8th Cir. 1967), *cert. denied*, 390 U.S. 951 (1968); *Kohler* v. *Kohler & Co.*, 319 F.2d 634, 637-38 (7th Cir. 1963).

4. CCI's Effort To Rewrite Section 14(e)

Finally, CCI suggests that in any event scienter is not a necessary element of a cause of action for damages under Section 14(e). In making this argument, CCI places its principal reliance on the phraseology of Section 14(e), but it offers no evidence at all that the first half of the section is to be read out of context as referring to omissions made without an intent to deceive. To the contrary, the first clause of Section 14(e) is taken almost verbatim from Rule 10b-5(2), a parentage the SEC expressly acknowledges (SEC Brief at 17), where it has been held by this Court to refer only to fraudulent transactions.** CCI simply ignores the fact that both the

---

cited by CCI for this point, were, of course, cases not involving damage claims under either Rule 10b-5 or Section 14(e).

* *Clegg* v. *Conk*, 507 F.2d 1351, 1362 (10th Cir. 1974) ("the conduct on which [defendant's] liability must have been predicated . . . was necessarily pursued knowingly and intentionally and with purpose to mislead").

** CCI attempts to characterize *Hochfelder* as reading clause (2) out of Rule 10b-5, on the ground that it goes beyond the statute, but that is the opposite of what the Court did. This Court found rather that when the SEC referred to omissions in Rule 10b-5(2) it *meant* omissions made with intent to defraud. 96 S. Ct. at 1390-91. This does not make superfluous the references to "fraud" in the

Senate and House reports describe Section 14(e) as being addressed to "fraudulent transactions." S. Rep. No. 550, 90th Cong., 1st Sess. 10 (1967); H.R. Rep. No. 1711, 90th Cong., 2d Sess. 11 (1968). CCI likewise makes no response at all to the fact that every court that has considered the question, including the *Chris-Craft II* court, has concluded that actions under Section 14(e) are subject to the same scienter requirements as those under Section 10(b).* Finally, CCI overlooks the fact that its view of Section 14(e) as extending beyond fraud to merely negligent misconduct is at odds with the statutory framework of the securities laws, which this Court analyzed in *Hochfelder*. 96 S. Ct. at 1388-89 & n.29. (*See* BPC Brief at 65-68)

The only support CCI offers for its position is three quotations (CCI Brief at 70-71) from the hearings on the Williams Act that were concerned with an entirely different issue. The Williams Act's primary purpose

---

second half of Section 14(e), and in Rule 10b-5(1) and (3). There are, as this Court has noted, other cunning devices. *Cf.* 96 S. Ct. at 1385.

* CCI's reliance (Brief at 70 n. *) on Judge Friendly's opinion in *Gerstle* v. *Gamble-Skogmo, Inc.*, 478 F.2d 1281, 1299 (2d Cir. 1973), to support the proposition that Section 14(e) is more nearly analogous to the proxy rules than to Rule 10b-5, is particularly curious. In *Gerstle*, Judge Friendly expressly endorsed the premise of the *Chris Craft II* court that the scienter standard under Section 14(e) should be the same as that under Rule 10b-5, rather than that under the proxy rules.

CCI asserts (CCI Brief at 67) that Judge Friendly in *Gerstle* approved the *Chris-Craft II* definition of scienter, but there is no basis for the assertion. Judge Friendly, who did not participate in the *Chris-Craft* cases at any stage, was merely noting their verbal invocation of a scienter requirement. Nothing in the case before him required him to comment on the inadequacy of the *Chris-Craft II* legal formulation (particularly since *Hochfelder* had not been decided); nonetheless, he noted that the scienter test used in *Chris-Craft II* required only awareness of the omitted fact, and he recognized the "conceptual problem" inherent in that approach because it entailed "virtually absolute liability." *Id.* at 1301 n.20.

was to add new affirmative requirements for specific disclosures by tender offerors, by others acquiring substantial blocks of stock, and by persons opposing tender offers. In particular, new Section 14(d)(4) of the 1934 Act gave the SEC general authority to issue regulations affirmatively governing "[a]ny solicitation or recommendation to the holders of . . . a security to accept or reject a tender offer." Most of the discussion at the hearings, including CCI's three quotations, concerned the affirmative disclosure requirements and the SEC's need for new rulemaking power under Section 14(d)(4).

None of the remarks that CCI quotes was concerned with Section 14(e) at all. In the first of the three, former Chairman Cohen made it clear that he was discussing the rulemaking authority of the SEC under Section 14(d) and was not thinking of Section 14(e), much less of private damage actions.* Neither of the other quotations mentions Section 14(e), and it is apparent from their context that the subject under discussion was the specific "affirmative requirements which would be developed by the Commission" under Sections 13(d) and 14(d).** It is a serious misrepresentation to read these remarks, uttered in support of a grant of authority to write rules requiring specific conduct, as suggesting that something less than fraud would support liability under a section no one was talking about and which the House

* CCI quotes former Chairman Cohen as saying that the Williams Act would apply to literature put out by management opposing a takeover which, while not "subject to easy establishment as being outright fraudulent . . . may be inadequate." *Senate Hearings* at 178. What CCI omits is that former Chairman Cohen's comments were directed at the need for legislation "to permit the [SEC] to develop some simple rules" that would "permit the Commission to deal effectively" with unfair practices. The rulemaking power the former Chairman was discussing was provided in Section 14(d), and his comments had nothing to do with either Section 14(e), which did not then grant the SEC any rulemaking power, or with damage actions under any section.

** *House Hearings* at 18; *see Senate Hearings* at 210.

and Senate Committees descibed as a "fraudulent transactions" section.

IV. CCI Did Not Prove That It Was Injured by BPC's Alleged Violations

The "causal nexus" between BPC's supposed violations and CCI's supposed injury has two elements, neither of which CCI makes any attempt to analyze. First, CCI would have to establish that a significant number of Piper shareholders would have rejected BPC's exchange offer if they had known of the suspended BAR negotiations. Second, CCI would, in addition, have to establish that it lost its opportunity to gain control of Piper because of BPC's supposed missteps. The question in this case is whether these elements are to be conclusively presumed after contrary findings by the trier of fact. The district court, after trial, found that CCI had failed to establish "a reasonable probability that its defeat and damage were connnected with the claimed violations." (A-145) CCI proposed, and the court of appeals agreed, to rely on speculation and presumption instead.*

A. *The Court of Appeals Improperly Presumed That BPC's Offer Would Not "Have Attracted Any Takers"*

The district court found that CCI had failed to prove that "a single" tendering Piper shareholder would have

---

* In contrast to the position CCI takes here, the SEC suggested to this Court in *Blue Chip Stamps* that if the class of private plaintiffs who could sue for damages under Section 10(b) were to be expanded, the "public policy of preventing unwarranted damage awards" would justify requiring a plaintiff to meet high standards of proof of harm. *Brief for the Securities and Exchange Commission as Amicus Curiae, Blue Chip Stamps* v. *Manor Drug Stores, Inc.* at 7. And in its amicus Brief in this case, the SEC does not seek affirmance of the decision below on the causation issues. *See* pp. 64-66, *infra*.

refused BPC's exchange offer and taken CCI's had he known of the BAR negotiations. (A-145) The court of appeals agreed, but held that even if the BPC offer were "superior to that of CCI, taking into account the BAR loss," *Mills* and *Ute* required a conclusive presumption that BPC's offer would not "have attracted any takers." (A-60)

The court of appeals was wrong on this point because, as we showed in our Brief (at pp. 70-76), *Mills* and *Ute* simply did not involve any presumption at all about how the shareholders, the plaintiffs there, would have acted in the absence of the defendants' violations.* CCI quotes at length from *Mills* and *Ute* but cannot reconcile what this Court did there with what the court of appeals did here. CCI then characterizes BPC's argument as an "attempt to distinguish *Mills* and *Ute* on the ground that Piper's stockholders, rather than Chris-Craft, relied" on the BAR omission. (CCI Brief at 84-85) That is shrewd, but false. The very point is that CCI did *not* prove that any tendering Piper shareholders "relied" in the sense that but for the omission they would have rejected BPC's offer; the court of appeals simply presumed, in the face of a contrary trial court finding (A-145), that BPC's offer would have failed entirely. Thus CCI's reliance on *Crane* is misplaced ** and its citation of *Borak*

---

* In *Mills* the plaintiff shareholders were injured, in their right to corporate suffrage, by the omission itself. In *Ute*, the scheme cheated the Indian shareholders without regard to whether they relied on any particular misinformation. Indeed, *Mills* says the shareholders were injured by the material omission *whether or not* they would have changed their votes. 386 U.S. at 384 n.6.

** As we pointed out before (BPC Brief at 73 n. **), *Crane Co.* v. *Westinghouse Air Brake Co.*, 419 F.2d 787 (2d Cir. 1969), *cert. denied*, 400 U.S. 822 (1970), would permit a plaintiff who was not deceived himself to recover only if others are "shown" to have been deceived, and only if "this was in fact the cause of plaintiff's claimed injury." *Id.* at 797, *quoting Vine* v. *Beneficial Finance Co.*, 374 F.2d 627, 635 (2d Cir.), *cert. denied*, 389 U.S. 970 (1967). Judge Friendly later added in *Crane Co.* v. *American Standard*,

is beside the point.*

CCI seeks comfort in this Court's recent decision in *TSC Industries, Inc.* v. *Northway, Inc.*, 96 S. Ct. 2126 (1976), but that case clearly illustrates the error of the court of appeals' conclusive presumption that BPC's offer would not "have attracted any takers." *TSC* held that a fact is "material" and should be included in a proxy statement "if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote." *Id.* at 2133. But materiality is not in issue here. The question here is whether a finding of materiality ** creates a conclusive presumption in favor of a third party that the tendering Piper shareholders would not have tendered, and on that point *TSC* says quite plainly that a finding of materiality does *not* imply that the fact in question "would have caused the reasonable investor to change his vote." 96 S. Ct. at 2133.***

Inc., 490 F.2d 332, 344 (2d Cir. 1973), a case CCI does not bother to discuss, that "it is not to be merely assumed" that absent the defendant's violation the plaintiff's plans would have been successful.

* In *J.I. Case Co.* v. *Borak*, 377 U.S. 426, 431 (1964), this Court carefully avoided the causation issue, saying "the causal relationship of the proxy material and the merger are questions of fact to be resolved at trial, not here. We therefore do not discuss this point further."

** Here, of course, the district court found only that a reasonable Piper shareholder "might have hesitated" to exchange (D-15), a finding that falls below the strict *TSC* standard. The court of appeals recited a standard more in keeping with *TSC* (*see* A-35), but it did not purport to be substituting its own assessment of the facts for that of the district court, and, if it had, that would have been wrong under *TSC* itself. 96 S. Ct. at 2133.

*** CCI effectively concedes that BPC was entitled to rebut the court of appeals' presumption of reliance (if such a presumption is proper at all), arguing only that BPC had an opportunity to do so. (CCI Brief at 86) But that argument is transparently insufficient. BPC did not have any warning that the burden might be on it to prove that disclosure of the suspended BAR negotiations would not have made the tendering Piper shareholders reject BPC's offer.

B. *The Court of Appeals Improperly Presumed That BPC's Alleged Missteps Determined the Outcome*

CCI tells this Court that BPC's claimed violations "actually reversed the outcome of a close contest" (CCI Brief at 80), and it was awarded damages by the court of appeals as if this were true. But even with the help of a presumption that BPC's offer would not "have attracted any takers," CCI had proved no such thing. (A-56, 66, 144-45, 150; B-26) And proof, not presumption, is what CCI needed, because whatever *Mills* and *Ute* may say about the need to prove that the tendering Piper shareholders would not have tendered, these cases clearly do not require or permit a presumption that BPC's actions "reversed the outcome" of the whole contest or caused the losses CCI now seeks to recover from BPC.* *See Rondeau* v. *Mosinee Paper Co.*, 422 U.S. 49, 64 (1975).

CCI says that "causation was a matter of mathematics" (CCI Brief at 79), but in fact its causation argu-

---

* For example, an extensive recent comment on this case clearly explains the need to distinguish causation of injury from reliance by the tendering Piper shareholders:

> In the complex setting of a tender battle, where the potential pathways of causation are multiple, application of the *Mills* presumption requires care. *It should give rise to nothing more than a presumption of reliance. An injured party, to recover, should be required to prove all other elements necessary to establish but-for causation of its injury.*
>
> *The Second Circuit in Chris-Craft did not require such proof.* Though it spoke of *Mills* as creating only a presumption of reliance, the court in fact presumed but-for causation as to each violation. In so doing, the court set an unfortunate precedent for tort recovery in the tender offer context—a precedent unwarranted by earlier securities case law, unjustified under established tort principles of causation, and potentially inhibitory upon take-over bids, contrary to the express intent of Congress in promulgating the Williams Act. Note, *Chris-Craft: The Uncertain Evolution of Section 14(e)*, 76 Colum. L. Rev. 623, 658 (1976) (footnotes omitted, emphasis added).

See also SEC Brief at 147-48.

ment rests entirely on speculation and conjecture, belied by the record and the findings:

—First, as we noted above, CCI speculates that all the Piper shareholders who tendered to BPC would have refused to tender had the suspended BAR negotiations been discussed in the prospectus. (*E.g.*, CCI Brief at 82) The district court found against CCI on the causation issue, and held in the SEC case only that disclosure "might" have caused an investor to "hesitate." Yet the price of BPC's stock went up when the BAR sale was later agreed to and announced (App. 591A), and no tendering Piper shareholder either sued BPC or accepted BPC's rescission offer.

—Second, CCI speculates that if all of the tendering Piper shareholders had rejected BPC's tender offer, many would have accepted the less generous CCI offer. At one point, CCI tells this Court that it "*would* have obtained *some*, if not most, of the Piper shares tendered to" BPC (Brief at 23 n. **, emphasis added); later it says that it "*might* have attracted *many* of" those same shares. (*Id.* at 87, emphasis added) Neither statement is supported by evidence or accompanied by a citation to the record. This is understandable, for CCI is trying to ignore the district court's explicit finding with regard to the BAR matter that:

> There is no proof that a single exchanging Piper shareholder would have refrained from the exchange *and* taken an offer for his shares from Chris-Craft instead of that from Bangor Punta. (A-145)

CCI's similar speculation with respect to the shares BPC acquired for cash in May (CCI Brief at 81) runs afoul of another explicit finding of the district court: ". . . there is no basis for concluding that, absent Bangor Punta's acquisition of these blocks, Chris-Craft would have achieved its goal of control." (A-150)

—Third, CCI speculates that if it had led 41%-31% at the end of the competing exchange offers, it could not have been overtaken. (CCI Brief at 79) For this proposition, CCI misquotes a BPC witness and trots out testimony of its own witness that was expressly rejected by the district court. What BPC's expert really said was that a 41%-31% lead would be "formidable but not insurmountable" (App. 2877A), *if* CCI had "the cash resources and the determination, apparent determination, to pay whatever price is necessary . . . ." (App. 2876A) But those are just what CCI lacked: CCI had virtually exhausted its cash and borrowing capacity by February (A-113-15), and it voluntarily "withdrew from the struggle" (A-18) before BPC obtained a majority. And the testimony of CCI's own witness as to a "99-1 certainty" was expressly rejected by the district court because it lacked "common sense." (B-64, n. 18) Both the lower courts agreed that CCI had not shown that it could have won absent BPC's missteps. (A-56, 145, 150)

—Fourth, CCI speculates that BPC's 4% lead (45%-41%) after the competing exchange offers could not be overcome. (CCI Brief at 22) This speculation has no more support than the speculation that CCI could not have been overtaken with a hypothetical 41%-31% lead. But on this point there is no room at all for CCI's arguments because there are judicial findings, made on precisely the critical day, that the contest was still open.*

The fact is that the control contest was won by the higher bidder, as it should have been. The district court

---

* Judge Tenney on August 19, 1969 denied CCI's request for a preliminary injunction, holding that "[n]either party has gained control of Piper, and both are still in a position to do so." (C-47) The Second Circuit affirmed, saying that CCI did not even contend "that prior misdeeds of Bangor Punta so determined the course of the competition for shares . . . that Chris-Craft was placed at any real disadvantage." (C-9) Yet CCI "withdrew from the struggle" (A-18) on August 19, 1969 when it failed to get its injunction.

found, and the court of appeals agreed, that BPC's exchange offer was worth more than CCI's while they overlapped. (A-140 n.10; A-42-43 & n.19) CCI " 'shot its bolt' in the financial sense by early February 1969," and "although additional Piper shares were available in the market after the expiration date of CCI's [cash] tender offer, some at less than $65 per share, CCI purchased only 9,100 shares" in over two months.* (A-114-115, footnote omitted) After the exchange offers, with the control contest open to either bidder (C-9, 47), BPC spent $7 million in cash, while CCI spent only $2 million and then withdrew.** The trier of fact, an experienced district judge, saw right through CCI's causation arguments; it was the court of appeals, reviewing the cold transcript, that reversed the verdict of the marketplace.

* CCI claims it had not run out of funds (CCI Brief at 88 and n. *), but its citations do not support it. First, CCI cites Judge Timbers' opinion for the proposition that it had arranged to borrow up to $22 million in February 1969, but neglects to add that, as Judge Mansfield pointed out, "the record shows conclusively that CCI's chances of obtaining such a loan were negligible, due to a restrictive agreement in effect with its senior noteholders and the prohibitive cost of borrowing additional funds." (A-113) The cost was "a staggering 43.11%!" (A-114) CCI, of course, never did obtain the loan. Then CCI refers to its cash on hand from April through August, but neglects to add that it could find $10 million only by using all the cash it had after essential working capital (App. 3085A-87A), and that it would have needed the consent of its senior creditors to spend more than $3 million. (App. 3111A) Finally, CCI says that its bank "obviously" would have made funds available to it. But its banker said that his bank had reached the legal limit on loans to CCI by August, and therefore could not provide CCI another penny. (App. 3110A)

** At the conclusion of the competing exchange offers BPC had committed approximately $59.5 million, CCI $42.6 million. (A-18) Thus CCI, if it had the resources, had $16.9 million to go just to make an effort equal to that of BPC. If it had the money in August 1969, and if it had been willing to make an equal effort, CCI could have offered $126 for each of the 134,611 Piper shares it needed to gain control, far more than the $80 BPC went into the market and paid.

CCI's reliance on *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251 (1946), simply backfires. The factual differences are alone dispositive. In *Bigelow* the plaintiff showed both that he made less money after the unlawful conspiracy took hold than before and that a demonstrably inferior competitor who was part of the illegal antitrust conspiracy made more money than the plaintiff did during the relevant period. Here, by contrast, CCI has not shown that either of BPC's missteps made a difference in the outcome of the contest. But there is even a more fundamental point. In *Bigelow*, the court of appeals, in holding that injury had not been proved, had substituted its judgment for that of the trier of fact. This Court reversed, holding that the evidence sustained the verdict. There is not a hint in the opinion that a trial court verdict for the defendant ought to be reversed—as was done here—on the basis of appellate presumptions of injury used to overcome contrary findings of fact, and not once in the history of the *Bigelow* doctrine in this Court has that case been used for that purpose.* *Bigelow* teaches that appellate courts ought not to substitute their own views for those of the trier of fact save in unusual circumstances. Application of that rule to this case requires the reinstatement of the district judge's finding that BPC did not cause any injury to CCI.

---

* *See, e.g.*, *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962). Another illustrative case is *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 125-29 (1969). There an appellate court was held to have properly set aside a verdict for the plaintiff since the record showed that factors other than the defendant's anti-trust violation had foreclosed plaintiff from the market anyway.

The stirring language CCI quotes from *Eagle* v. *Horvath*, 241 F. Supp. 341 (S.D.N.Y. 1965) (CCI Brief at 81), has nothing to do with this case. *Eagle* involved a motion for summary judgment by defendants who claimed that since they could have accomplished the challenged merger by redeeming certain preferred stock instead of soliciting proxies, causation was not shown. The defendant's motion was denied. Here there was a full trial, and the district court found that CCI had failed to prove that BPC's missteps caused any injury to CCI.

V. The Court of Appeals' Damage Formula Vastly Overcompensates CCI

The courts below agreed that "CCI had not demonstrated that it would have obtained a controlling position in Piper absent defendants' violations." (B-26) All that the court of appeals thought CCI lost was its *opportunity* to gain control of Piper. The district court "generously valued" this opportunity, after a trial, at $1.6 million. The court of appeals raised the damage award to $25.8 million, plus interest, on the erroneous theory that BPC had to insure CCI against market losses unrelated to anything BPC did and due primarily to the fact that for extraneous reasons Piper's near-term prospects turned out to be less rosy than both tender offerors thought.*

CCI tries to justify this extraordinary result by asserting that its injury had two elements: "the lost opportunity to compete for control" and "the wrongful conversion" of CCI's Piper stock into "an illiquid 42% minority." (CCI Brief at 91) This double counting is unsupported in law or fact. If CCI had won the control contest it would have just one thing that it now does not have: Piper shares that it might (or might not) be able to sell as a block for a premium over the price that any other Piper shareholder could get for his shares.** Control would not have insured it (as the judgment below does) against the decline that occurred in the market value of all Piper shares. Taking into account the fact that BPC would have been (as CCI now is) a large minority shareholder able to elect several directors, and that there are numerous restrictions on the ability of a ma-

---

* The SEC does not seek affirmance of the decision below on the damages issues. *See* pp. 65-66, *infra*.

** *See* B-69. CCI brought out on cross-examination of BPC's expert that in a public offering the control premium would be dissipated, and that the larger number of shares involved would actually make the public offering of a control block more difficult than that of a minority block. (App. 2833A-34A)

jority holder to run a company for its own benefit or to sell "control" for more than other shareholders can get, the district court found that the control premium here would be no more than 10% of the fair market value of Piper shares. (B-69) Assuming *arguendo* that CCI actually did lose its chance to get that 10% premium, its recovery cannot exceed the value of its goal. *See* authorities cited in BPC Brief at 82; *see also Brief for the United States as Amicus Curiae on Petitions for Certiorari* at 22.

CCI's unsupported claim that its Piper shares were "transformed" into an "albatross" (CCI Brief at 23) "of virtually no value" (*id.* at 98) is on its face an absurd exaggeration.* At the end of the contest, CCI's Piper shares were worth per share, in a public offering, just what BPC's Piper shares were worth (App. 2833A), and in a private offering, according to the findings of fact, no more than 10% less. The district court found on November 6, 1974 (B-73), and CCI's subsequent reports to the SEC on Form 4 confirm, that since 1969 and continuing into 1976 CCI has steadily bought Piper shares, adding some $300,000 to the weight of its "albatross." On May 28, 1976 Piper paid a cash dividend of $1.10 per share, worth nearly $800,000 to CCI. *See* Report on Form

---

* Judge Pollack found: "There has been no showing that CC has been 'locked-in' so that the sale of its Piper stock has been impossible." (B-76) This finding was affirmed by the court of appeals. (B-35)

CCI's assertion that its interest in Piper "was not even regarded as good collateral by its bankers" (CCI Brief at 98) is just wrong. CCI's citation (App. 3120A-21A) shows its banker was not talking about the collateral value of its minority holding at all; he simply said that in August 1969, with BPC holding a 45%-41% lead, he would have wanted to know "will the additional loan in fact give Chris-Craft control?" before loaning CCI the money to buy more Piper stock in connection with its quest for control. Even this was speculation, since he had just testified that his bank had reached its legal limit on loans to CCI. (App. 3110A)

10Q for the Quarter Ending June 30, 1976, filed by Piper with the SEC.

CCI is misleading at best when it claims that it (or someone stepping into CCI's shoes) would be at BPC's "mercy with respect to management and policy decisions" at Piper. (CCI Brief at 24 n.**) Through 1979, the Piper Board is frozen at eight, and CCI can elect four of the directors. (B-50 n.6, 86) Even after that date, because of cumulative voting, CCI is guaranteed half of the directors if there are an even number, and one short of half otherwise.* Cooperation by "majority" and "minority" stockholders in this situation is a practical necessity, and CCI participates fully in the management and financial future of Piper. Nor does CCI's charge that BPC could compel a merger at any time and buy CCI's interest "for a song" (CCI Brief at 98) have any substance. This precise contention was found by the district court, even apart from the legal obstacles, to be highly questionable as a "matter of practical finance." ** State law appraisal proceedings

* CCI's response that BPC might eventually be able to change the articles of incorporation to eliminate cumulative voting overlooks the fact that such a change would, under Pennsylvania law, give CCI the right to demand an appraisal and to force BPC to pay cash for CCI's Piper shares. Pa. Stat. Ann. tit. 15, § 1810 (Supp. 1976).

** B-51 n.7. Judge Pollack continued:

> At the bottom of a business cycle and in a period of contraction, BP (and thus Piper) would clearly have limited resources or at least limited economic incentives to fund an appraisal award; CC's huge minority block, by any standard, would sport a heavy price tag to be borne by BP in such a proceeding. Moreover, as markets rise, the cash cost of satisfying an appraisal demand might well increase greatly without a corresponding increase in available cash to fund the payout, thus chilling any prospect of merger in such circumstances. *Id.*

In Pennsylvania (the relevant jurisdiction) statutory appraisals are based on long-term performance to minimize the impact of the business cycle. *See* Note, *Corporations—Fair Value for Dissenting Shareholders Under the Pennsylvania Appraisal Statute,* 78 Dick. L. Rev. 582, 595 (1974).

(and the requirement that the dissenter be paid "the fair value of his shares" in cash, Pa. Stat. Ann. tit. 15, § 1515 (Supp. 1976)) provide complete protection, especially for a holder of a large minority block, who is able and willing to litigate.*

The cases CCI cites (Brief at 92-93) to support its double counting theory of damages do not help CCI any more than the *Chasins* and *Esplin* cases, on which the court of appeals relied.** As we demonstrated in our Brief (at 89-91), *Chasins, Esplin,* and similar cases are inapposite because, if they were in fact correctly decided, they turn on the defendant's inducing the plaintiff to act at all. CCI tries to bring itself under those cases by asserting that it was induced, since it thought BPC would comply with the law. (CCI Brief at 95) That is nonsense. CCI entered the contest long before BPC and acquired most of its "albatross" before BPC entered; and after BPC did enter, it obviously did not "induce" CCI—in any meaningful sense of that word—to continue. If CCI pre-

---

* CCI tries mightily to suggest (Brief at 23-24) that its appraisal right in the event of a merger would be worthless, but CCI simply ignores the district court's acceptance of testimony that the per share appraisal value was $49.46 (B-56) and its finding, precisely in point, that the fair market value was $48 per share on the relevant date. (B-57)

** *Harris* v. *American Investment Co.*, 523 F.2d 220 (8th Cir. 1975), *cert. denied*, 96 S.Ct. 784 (1976); *Foster* v. *Financial Technology Inc.*, 517 F.2d 1068 (9th Cir. 1975); and *Myzel* v. *Field*, 386 F.2d 718 (8th Cir. 1967), *cert. denied*, 390 U.S. 951 (1968), are all cases in which the plaintiff was fraudulently induced to buy or sell. And *United States* v. *Swift & Co.*, 270 U.S. 124 (1926); *Schwartz* v. *NMS Indus., Inc.*, 517 F.2d 925 (5th Cir. 1975), *cert. denied*, 96 S.Ct. 785 (1976); and *In re Kellett Aircraft Corp.*, 186 F.2d 197 (3d Cir. 1950), are all breach of contract cases dealing with mitigation of damages. In *Swift & Co.*, for example, in sharp contrast to this case, there was no market price for the salty bacon, and the defendant was principally responsible for reducing the price that the plaintiff could get as he tried to sell and mitigate damages. 270 U.S. at 147-49.

vails on its inducement theory, every securities plaintiff would make the same argument, and every securities defendant would be turned into an insurer of the plaintiff's investment. CCI's theory cannot be squared with Section 28(a) of the 1934 Act or such cases as *Feit* v. *Leasco Data Processing Equipment Corp.*, 332 F. Supp. 544, 586 (E.D.N.Y. 1971). (*See* BPC Brief at 82-91)*

CCI's effort to retain the insurance proceeds awarded by the court of appeals extends to a staggering misuse of the Solicitor General's Brief for the United States on Certiorari. CCI asserts that the Solicitor General "calculated identical damages by an alternative formula" (CCI Brief at 97), neglecting to note that the formula was clearly identified as pure speculation based on data that could not be found in the record. *Brief for the United States as Amicus Curiae on Petition for Certiorari* at 23-24. In fact, the Brief for the United States reached for an alternative formula because it could not justify forcing BPC to compensate CCI

> for a loss caused by a post-injury decline in the market value of Piper stock of approximately $15 per share—a loss that Chris-Craft would have sustained even if petitioners had not violated the securities laws and, indeed, even if Chris-Craft itself had succeeeded in the contest for control. *Id.* at 23 n.14.**

---

* CCI's failure to mention Section 28(a), which limits damages under the 1934 Act to "actual damages on account of the act complained of," means that it has not even responded to one of the basic legal issues on which this Court granted certiorari, the construction of Section 28(a). *See* BPC's Petition at 27-28; First Boston's Petition at 11.

** The Solicitor General has expressly advised the Court that the Brief of the United States "took the position that the court of appeals had followed an incorrect approach in measuring damages." *See* his notation in the SEC Brief at 198.

The court of appeals' decision in *Chris-Craft III* simply cannot be justified.* It gave CCI vastly more than it would have had if it had won control of Piper. If BPC is held to have interfered with CCI's opportunity to gain control, the proper damage award is one based on the value of that opportunity—the award made by the district judge.**

---

* CCI tries to salvage the court of appeals' excessive judgment by a supposed verification based on a hypothetical private sale on September 5, 1969. (CCI Brief at 92, 97) But that afterthought starts from the same erroneous assumption that CCI was entitled to be bailed out of its business decision to buy Piper stock. The "vertification" itself is full of mistakes. *See* B-31-32 n.24. The court cf appeals first added a 5% control premium to CCI's *cost*, which presumably already included what CCI thought its opportunity was worth; and, in any event, the court of appeals had just held that legally it had to ignore any premium in order to justify not remanding for a determination of damages. (B-25-26) The court of appeals then computed the private sale price by taking 25% from $43.50, the net amount CCI would have received in a public offering on September 5. The witness on whom the court of appeals relied had clearly referred to a 25% discount from the public offering price, which he had estimated as $46, not from the net to CCI after expenses. (App. 2831A) The correction of these plain errors would have reduced the "alternative" calculation of damages, at best $1.7 million below the award, by another $3.5 million. And even then the alternative would have been valid only if CCI had been certain to win control of Piper absent the violations and if it was entitled to be bailed out of its own misjudgment of Piper's value.

** The *Chris-Craft III* decision has been harshly criticized in recent law review commentary. *See* Note, *Chris-Craft: The Uncertain Evolution of Section 14(e)*, 76 Colum. L. Rev. 634, 635 (1976) (the "interpretation of Section 14(e) in these two areas [causation and damages] cannot be justified"); Case Note, 89 Harv. L. Rev. 1239, 1247 (1976) (criticizing "the double counting inherent in [the] award of final blockage"); Note, *Survey of 1974 Securities Law Developments*, 32 Wash. & Lee L. Rev. 719, 789 (1975) (award in *Chris-Craft III* is "frighteningly punitive").

ADDENDUM: THE SEC BRIEF

The SEC urges the Court to create private damage remedies for a plaintiff that neither bought nor sold under Rule 10b-6, and for a tender offeror under Section 14(e). (SEC Brief at 194) The SEC does not urge affirmance on the scienter, causation, or damages issues (SEC Brief at 194) and in fact makes concessions that should require reversal on these points. *See* pp. 64-66, *infra.*

For all its general learning, the SEC Brief adds neither analysis nor relevant authority on any of the issues actually before the Court.* More eloquent is what the SEC does not say, and the lack of relevant authority it found for the positions it takes.

1. *Rule 10b-6*

The SEC fails to acknowledge that it never warned BPC (as it warned CCI) against cash purchases of Piper shares, that it never accused BPC of violating Rule 10b-6, and that it never required BPC to report any such violation in its disclosure materials. Even though the point has been challenged in this Court, the SEC has provided no support for the assertion in its May 5, 1969 Release that proposed Rule 10b-13 codified "existing interpretations of Rule 10b-6." **

---

* Many of the "authorities" the SEC cites are quotations from unidentified contributors to legislative compilations, often so truncated and shorn of context that it is impossible to tell what the contributor was actually talking about, even if any Congressman read his submission. *See, e.g.,* SEC Brief at 69-74. Some apparently important quotations, such as the acknowledgment that Section 14 (e) is "in the tradition of the general fraud provisions" (SEC Brief at 64), are unaccompanied by citations.

** To support this claim, the SEC cites only a 1959 law review article whose one arguably relevant paragraph does not even deal directly with the issue at hand. *See* Foshay, *Market Activities of Participants in Securities Distributions,* 45 Va. L. Rev. 907, 931-32

The SEC does, however, provide an interpretation of Rule 10b-6 that expressly supports BPC's understanding of the purpose of the Rule:

> The rationale [of the rule] is that a potential purchaser of the securities *being distributed* should not be induced into buying them because of abnormal market pressures driving the price up through secret purchases by the issuer or [its] underwriters. (SEC Brief at 180, *quoting* Binder, *The Securities Law of Contested Tender Offers,* 18 N.Y.L.F. 569, 666 (1973)) (emphasis added)

In other words, the SEC acknowledges that, in terms of the facts of this case, Rule 10b-6 was intended to protect the potential purchasers (*i.e.*, the Piper shareholders) of the BPC securities that were in distribution from being misled into tendering by artificial market activity increasing the price of BPC securities. But here there are express findings, affirmed on appeal and not challenged by the SEC, that there was full disclosure, no intent to mislead, "not a scintilla of evidence" that anyone was actually misled, and no effect on the market for any security. (A-150-51)

The SEC is therefore reduced to arguing (SEC Brief at 187-89) that it has the power to adopt a *per se* rule of manipulation under Section 10(b) and thus create a cause of action for a plaintiff who (a) was admittedly not the intended beneficiary of the rule, (b) neither pur-

---

(1959). The SEC cites *nothing* from its own rulings or statements. It also ignores the opinions of Judge Tenney and Chief Judge Lumbard in this case, and Judge Weinfeld's opinion of February 7, 1969 (pre-dating the May 1969 release) in *Armour & Co.* v. *General Host Corp.*, 296 F. Supp. 470, 476 & n.18 (S.D.N.Y.):

> [S]ubstantial legal issues exist whether Rule 10b-6 is applicable at all to the instant transactions. The principal question is whether subsection (b) of the Rule applies to the stock of the "target" corporation as well as that of the distributor.

chased nor sold either the security that was supposedly manipulated "*per se*" or any other security "in connection with" which the violation occurred, and (c) was not injured by the violation, except in the Pickwickian sense in which the low bidder at an auction is injured because the high bidder ran a red light at an empty intersection to get there in time. But the argument falls apart at every step. Even if the SEC has authority to issue *per se* rules dispensing with scienter under an antifraud section (and thus circumventing *Hochfelder*), it did not do so here. The SEC cannot adopt a *per se* rule merely by declaring in a release that a *proposed* rule "codifies existing interpretations" that turn out not to exist. And when (if ever) the SEC does succeed in creating a *per se* rule, that merely makes the fact of violation automatic: express findings (as here) that the defendants' actions had neither the prohibited purpose nor the prohibited effect obviously preclude a claim that a violation caused actual injury.

The SEC Brief is eloquently silent about CCI's suggestion in this Court that BPC's purchases of Piper stock after it announced its intention to make an exchange offer might have violated Section 14(e). Instead, the SEC suggests, with a note of some despair, yet another new theory: CCI might be granted standing under Section 9(e) of the 1934 Act. Were less at stake, it would be amusing that this new violation is suggested for the first time on page 191 of an amicus brief filed in this Court more than seven years after the events.

The new Section 9 theory is inapposite on three different grounds. First, the SEC says that Rule 10b-6 was adopted partly under the authority of Section 9(a)(6), but that wholly undermines the SEC's contention that Rule 10b-6 is a *per se* rule for whose violation no intent is required. Section 9(a)(6) applies only to transactions effected for the "purpose" of causing a prohibited manipulation; there is a finding of no such purpose here.

Second, Section 9(e) creates express, not implied, damage liability for violations of Section 9, but it creates liability only against a person who "willfully" violates Section 9, and there certainly is no finding of "willfulness" in this case. Third, and most telling of all, a violator of Section 9 is liable only to "any person who shall purchase or sell any security at a price which was affected by such action or transaction," and CCI's action would fail because it has never alleged (and cannot allege) that there was any effect on the price of any security bought or sold by CCI or any other security. In sum, the existence of Section 9, with its express liability provision and its acknowledged relationship to Rule 10b-6, argues strongly against, not for, CCI's case here.*

2. *Section 14(e)*

The SEC's essay on tender offers adds not an ounce of relevant authority on the question whether Congress intended that a tender offeror can sue for damages under Section 14(e) against anyone, particularly against another tender offeror whose securities are held by the former target company shareholders. Most of the essay is devoted to much broader questions that do not need to be decided here.

First, despite all of the SEC's assertions about what can be deduced from the legislative history, there is not a single sentence uttered by (a) any member of Congress, (b) any member of the Executive Branch, or (c) any representative of the SEC, suggesting that anyone

---

* The SEC also suggests (Brief at 185-86) that the Court emasculate *Blue Chip Stamps* by declaring that any purchase of a "relevant" security will suffice even if there was no purchase or sale of any shares "in connection with" which the violation occurred. Under the SEC's theory, the owner of a security could sue under Rule 10b-5 for being misled into failing to sell, alleging merely that he was once a purchaser. *But see Blue Chip Stamps,* 421 U.S. at 737-38.

at all would have a private action for damages under Section 14(e) or any other provision of the Williams Act. There is not a single mention of *Borak* or *Kardon* by any such person. If the SEC thought Congress should authorize private damage actions under Section 14(e) as a supplement to its enforcement powers, it not only failed to include such a provision in the legislation of which it was the chief draftsman, but it (and its representatives) failed to mention the point in any official or unofficial report, memorandum, testimony, speech, magazine article, or anything else, and no member of Congress ever gave the slightest sign that the SEC got the point across.*

The best the SEC can do is to quote from the written submission of Professor Israels—who never testified and whose submission is never mentioned by any committee or member of Congress—that he "assume[d]" that the SEC would be able to enforce the various provisions of the Williams Act

> by proceedings for injunction in the Federal courts; and that under *J. I. Case Co.* v. *Borak*, 377 U.S. 426 (1964), a private litigant could seek *similar* relief before or after the significant fact such as the acceptance of *his* tender of securities. (SEC Brief at 54, quoting from Senate Hearings at 67) (emphasis added)

This isolated written submission of a private witness, even one accepted by the SEC as a "prominent com-

---

* In the absence of *any* relevant contemporaneous statement by the SEC during the congressional consideration of Section 14(e), we are grateful for CCI's quotation from *Zuber* v. *Allen*, 396 U.S. 168, 192 (1969), for reminding us of what this Court said on the following page: "if those administrators who participated in drafting the . . . act understood [it to mean what the agency contended it meant], they obviously failed to communicate their understanding to the drafters of the committee report." *Id.* at 193.

mentator" (SEC Brief at 54), gives CCI no help.* First, it is not directed, at least not specifically, to Section 14 (e). Second, it is apparent that Professor Israels, in his "such as" clause, spoke only of target shareholders as plaintiffs. Third, it is apparent that he spoke only of their obtaining relief "similar" to that obtainable by the SEC "by proceedings for injunction." Even if any congressman read these three lines from the extensive hearings record—and there is no indication that anyone did—he would not have gotten the message that the SEC is now trying to broadcast.**

Even more to the point, the SEC and the parties have found not a single sentence uttered by (a) any member of Congress, (b) any member of the Executive Branch, or (c) any representative of the SEC, suggesting an intention to give tender offerors any new rights or remedies or to protect them from anything except excessive regulation. There is, of course, evidence that Congress wanted target shareholders to be protected against misstatements either by tender offerors or by their own management, but there is not a word from any government official

* Even if the submission were in point, it is hornbook law that the statements of private witnesses at legislative hearings are not evidence of congressional intent unless there is some reason to think Congress was influenced by them. *See Hochfelder*, 96 S.Ct. at 1386 n.24; 2A Sutherland, *Statutes and Statutory Construction* § 48.10 at 210 (4th ed. C. Sands 1973) ("Generally statements made by others [than members or draftsmen] at the committee hearings as to the nature and effect of a bill are not accorded any weight.") (footnote omitted); G. Folsom, *Legislative History* 37 (1972) ("committee hearings are of limited utility" and written presentations are "less persuasive" than oral ones).

** The other witness the SEC relies on, Professor Painter, referred to *Borak* only in his written statement as well, and did so, like Professor Israels, in the context of "private remedies [for] injured investors." *Senate Hearings* at 140. Professor Painter did testify, but did not mention and was not asked about private remedies. *Id.* at 122-23. Neither CCI, nor the SEC, nor we have found any other reference in the legislative history to *Borak* or implied private remedies.

suggesting any concern for tender offerors other than making sure that the burdens of making disclosure to investors were not unequal.

Indeed, the words the SEC omits from the most nearly relevant paragraph in the legislative history are decisive here. The SEC quotes former Chairman Cohen as saying that the legislation would "serve to help the takeover bidder." (SEC Brief at 74) Mr. Cohen was discussing the duty of full disclosure by management to its shareholders, and the full sentence that the SEC garbles reads as follows: "In fact, the bill if passed might serve to help the takeover bidder in certain situations, because it would permit *the Commission* to deal effectively with certain practices which may be unfair and which may be engaged in by what may be called an entrenched management." *Senate Hearings* at 178 (emphasis added). Mr. Cohen went on immediately to say:

> "But the principal point is that we are not concerned with assisting or hurting either side. We are concerned with the investor who today is just a pawn in a form of industrial warfare. And that is all the argument here today is: Do you help one side, or do you help the other side? The investor is lost somewhere in the shuffle. This is our concern and our only concern." *Id.*

Consistently with this view, nothing in the Williams Act gives offerors any affirmative rights of any kind. There is not a word in the legislation or its history to support the SEC's assertion that the Act creates "a clearly articulated federal right in the plaintiff," to satisfy the first test of *Cort, see* 422 U.S. at 82 (SEC Brief at 9), or "has granted a class of persons [including plaintiff] certain rights," to satisfy the second test of *Cort. See* 422 U.S. at 82 (SEC Brief at 11). To the contrary, there is no evidence that anyone thought tender offerors needed either new protection or new remedies.

Third, in all of the discussion of the supposed parallel between Section 14(a) and Section 14(e), the SEC cites not a single case for the proposition that competitors can sue in that capacity for damages under either section, except the *Union Pacific* case, discussed above at 13-14, and *Nicholson File*, discussed above at 20-21. As noted above, the first case is a second alternative holding by a district court in an injunction action, and the second is a pre-*Rondeau* case which, although refusing to dismiss the offeror's complaint before trial, stated that damages should not be awarded against the target company if that would defeat the Act's purpose of protecting the target company's shareholders.*

Lacking cases in point, the SEC cites cases permitting a target company to seek an injunction to protect its shareholders as authority for the position that management can sue on its own behalf for damages. Surely the SEC recognizes the difference between lawsuits brought on behalf of a corporation for injunctive relief to protect its shareholders and lawsuits brought by management for damages to protect its personal interests, particularly in the context of a proxy fight or tender offer. The SEC also wrongly asserts that *Borak* obliterates the distinction between suits for injunctive relief and suits for damages. *Borak* simply holds that the protected class, the stockholders of the target corporation (on their own behalf or derivatively), can in an appropriate case not only obtain an injunction, but also recover damages from the directors of their own company for violation of a fed-

---

* Incidentally, although it is not essential to any issue before the Court, the SEC significantly overstates the parallel between Section 14(a) and Section 14(e). Section 14(a), the proxy section, is the basic provision requiring periodic disclosure by management to its shareholders, and it deliberately gives the SEC the broadest possible charter to write rules "in the public interest or for the protection of investors." It is true that power in a corporation can shift by vote or by purchase, but Section 14(e) does not parallel Section 14(a) either in its scope or in its language.

eral statutory duty plainly owed to stockholders. *Borak* did not consider whether permitting a person outside the "especial class" to secure an injunction that protects the interests of the class means that the person outside the class can also obtain damages for injuries to himself rather than to the class, because *Borak* involved only plaintiffs within the especial class. When the Court did consider this question, it ruled that while "100 injunctions are no more effective than one," *Hawaii* v. *Standard Oil Co.*, 405 U.S. at 261, damage awards raise different problems, and that Congress had drawn the class that can sue for damages more narrowly than the class that can sue for injunctions.*

The SEC has offered neither legislative history nor precedent nor reasoning to support its naked assertion that tender offerors are within the "especial class" Congress intended to protect. The SEC quotes *Cort's* declaration that the plaintiff may fall within the "especial class" where there is "a pervasive legislative scheme governing the relationship between the plaintiff class and the defendant class in a particular regard," 422 U.S. at 82 (quoted, SEC Brief at 8), and then argues that Sections 14(a) and 14(e) are both "pervasive schemes." (SEC Brief at 52-68) But Section 14(a) pervasively regulates the relationship between shareholders and other persons who are seeking their proxies. It has never been held to regulate, pervasively or otherwise, any "relationship" between two outsiders who both happen to be seeking mergers with the target company. Similarly, the Williams Act is a statute requiring all tender offerors to make full and fair disclosure "to those with whom they deal," S. Rep. No. 550, *supra*, at 11, "for the benefit of stockhold-

* Section 27 of the 1934 Act, much cited by the SEC, simply provides jurisdiction over causes of action that can properly be found to have been intended by Congress. To illustrate the point, the existence of Section 27 did not create a cause of action for the plaintiff in *Blue Chip Stamps*.

ers." 113 Cong. Rec. 855 (1967) (Senator Williams). There is no evidence that any member of Congress (or the SEC) thought of it as "a pervasive legislative scheme governing the relationship between" plaintiff tender offerors and defendant tender offerors.

The SEC's Brief, for all its discursiveness, singularly lacks a discussion of the serious policy issues (*see* pp. 22-27, *supra*) that Congress would have had to face if it had expressly addressed the problem of whether "all participants" in a tender offer contest should be allowed to sue one another for damages under Section 14(e). For the most part, the SEC, in Professor Hart's phrase, has "avoided shedding light on the problem by ignoring it." Hart, *The Relations Between State and Federal Law*, 54 Colum. L. Rev. 489, 511 n.72 (1954). The SEC does take up the federalism issue long enough to bemoan that State laws do not always correspond with what the SEC regards as a proper governmental response to tender offers (SEC Brief at 14), and that State remedies for tortious interference may not cover every case where one tender offeror, pursuing its own objectives, interferes with another. (SEC Brief at 44-46) This argument betrays disrespect for both the federal system and the relationship between Congress and the courts. What the SEC calls a "crazy quilt" (Brief at 126) is, as there illustrated, a broad State response to a problem, many aspects of which fall clearly within traditional areas of State concern. *See Cort*, 422 U.S. at 78. Certainly this Court should not imply a damage remedy for all participants in a control contest that would be "an intrusion of federal law into the internal affairs of corporations" (SEC Brief at 123), and that would displace State laws on tortious interference with business opportunities, in the absence of clear evidence that Congress intended to do just that.

3. *Other Issues*

As noted, the SEC does not seek affirmance of the decision below on the scienter, causation, or damages issues, but the SEC does toss in a few observations on the legal principles involved.

As to scienter, the SEC adds no relevant authority not cited in CCI's Brief and discussed above, and it adds no analysis at all.* The repeated acknowledgment that Section 14(e) is an antifraud provision patterned after Rule 10b-5 (SEC Brief at 17; 64-65 & n.159; 155 n. 364) does, however, support the conclusion of every court that has considered the issue that the Rule 10b-5 scienter requirement should apply.

As to causation and damages, the SEC acknowledges a distinction between "(i) causation for purposes of determining the existence of a cause of action—that is, liability—and (ii) damages causation." (SEC Brief at 145) Whatever the first of these may mean, the SEC is quite clear that the second must be proved by evidence:

> The presumption of causation from materiality, consequently, does not automatically entitle a private plaintiff to monetary damages—a causal connection between the material misstatement or omission on the one hand, and the consequences complained of on the other, must be demonstrated. Thus . . . the plaintiff here should

---

* The SEC does bring new meaning to the phrase "material omission" by quoting fragments from *Hochfelder* (Brief at 17) for the proposition that Section 14(e) reaches unintentional wrongdoing because Rule 10b-5 "after which it was patterned," reaches misleading conduct whether "intentional or not." *Hochfelder*, of course, holds exactly the opposite as to Rule 10b-5. But since the SEC was the principal draftsman of Section 14(e), this concession as to the ancestry of the provision is fatal to CCI's case on the scienter issue. *See also* Brief for the SEC as Amicus Curiae, *Iroquois Industries* v. *Syracuse China Corp.*, 23, 25 (Feb. 1969) (cited, CCI Brief at 48): Section 14(e) "is an antifraud provision similar to section 10(b) and rule 10b-5."

> be allowed to recover only those damages shown to have been caused by the violative conduct. *Id.* at 147-48

As to this very case, the SEC concedes:

> if the defendants can demonstrate that all or part of the plaintiff's damages were the result of factors other than the defendant's wrongdoing, the award of damages should be diminished accordingly. (SEC Brief at 161 n. 370)

These propositions alone would require reversal here, for the court of appeals first presumed causation and then determined, without either requiring the plaintiff or permitting the defendants to demonstrate anything, that CCI should be indemnified for a market decline that was plainly not caused by BPC.

The SEC also states that in the absence of scienter, damages against BPC should be limited "by analogy [to] the limitations on recovery in Section 12(2) of the Securities Act." (SEC Brief at 155-56) This, of course, would preclude recovery here.* In any event, the SEC adds, under Section 28(a) of the 1934 Act, damages must be limited to "actual damages on account of the act complained of," (SEC Brief at 48), and this limits damages to compensation for the "decline in value of [CCI's] Piper holdings, to the extent shown and to the extent caused by the wrongful act of the defendant . . . ." (SEC Brief at 133) The SEC then says daintily that, of course,

---

* Section 12(2) permits recovery only by purchasers and only of the consideration paid by the purchaser to the defendant. CCI could recover nothing from BPC under this theory. Section 11(g), which applies to both the underwriter (First Boston) and the issuer (BPC), limits the liability of *all* defendants to "the price at which the security was offered to the public," which is far below the damages awarded here. We assume that the SEC's failure to mention BPC and its two directors in connection with the Section 11(g) limitation, which is fully applicable to them, was a "mere negligent omission." (*Cf.* A-148)

"the precise method of computing damages in accordance with the general principle" is not its concern. (*Id.* at 171 n.371) The SEC's principle at least avoids CCI's double counting, but the SEC simply ignores the Brief for the United States on Certiorari, which its attorneys signed. That Brief acknowledged that "the precise method" used by the court of appeals wrongly compensated CCI for $15 per share ($15 million in the aggregate) of unrelated market decline and, in addition, risked "substantial overcompensation of the defeated contestant" by failing to make any discount for the fact that what CCI lost was, at most, an "opportunity" of very uncertain value. (*See* SEC Brief at 198)

Finally, the SEC makes the intriguing suggestion that where it has succeeded "in obtaining remedies ancillary to the award of an injunction" that "restore private party plaintiffs to their status quo ante, or otherwise make them whole for any injury suffered," an "award of damages to a prevailing plaintiff would be inappropriate." (SEC Brief at 17; *see also* 149 n.359) We agree. This principle requires reversal here. The SEC long ago obtained an injunction requiring BPC to offer rescission to every Piper shareholder who tendered pursuant to BPC's exchange offer. The cause of any injury to CCI is that they failed to rescind. The court of appeals added injunctions effectively barring BPC from controlling Piper's board of directors until 1979, when, legally at least, there will be no bar to an amendment of Piper's bylaws changing the number of directors to nine and giving BPC the 5-4 majority that this $36 million judgment so vastly overvalues. Damages were awarded to CCI in the face of the principle enunciated by the SEC, and they were calculated wholly without regard to the effectiveness of these other remedies in mitigating any damages allegedly suffered by CCI.

CONCLUSION

For the reasons stated in this Reply Brief and in our principal Brief, the judgment of the court of appeals should be reversed.

Respectfully submitted,

LLOYD N. CUTLER
MANUEL F. COHEN
LOUIS R. COHEN
STEPHEN F. BLACK
WILLIAM T. LAKE
MICHAEL S. HELFER
WILLIAM J. KOLASKY, JR.

WILMER, CUTLER & PICKERING
1666 K Street, N.W.
Washington, D.C. 20006

Counsel for Petitioners

JAMES V. RYAN
C. KENNETH SHANK, JR.
ALLAN J. GRAF

WEBSTER & SHEFFIELD
One Rockefeller Plaza
New York, New York 10020

CHARLES ALAN WRIGHT
2500 Red River Street
Austin, Texas 78705

Of Counsel

DUDLEY C. PHILLIPS
JOHN J. MARTIN
One Greenwich Plaza
Greenwich, Connecticut 06830

September 13, 1976